

IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO ANNOTATED

ORIGINALLY PUBLISHED BY AUTHORITY OF
LAWS 1947, CHAPTER 224

REPUBLISHED BY AUTHORITY OF
LAWS 1949, CHAPTER 167 AS AMENDED

Compiled Under the Supervision of the
Idaho Code Commission

R. DANIEL BOWEN
JEREMY P. PISCA ANDREW P. DOMAN
COMMISSIONERS

TITLE 28 (9-end)

MICHIE

LexisNexis and the Knowledge Burst logo are registered trademarks, and MICHIE is a trademark of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc

© 2013 State of Idaho
All rights reserved.

4224514

ISBN 978-0-7698-6248-4

PUBLISHER'S NOTE

Since the 2001 and 2005 publication of the bound volumes containing Chapters 9 to 52 of Title 28 of the Idaho Code, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for the former volumes has made it necessary to revise those volume. Accordingly, this new volume with Replacement Title 28, Chapters 9 to 52 is issued with the approval and under the direction of the Idaho Code Commission.

This publication contains annotations taken from decisions of the Idaho Supreme Court and the Court of Appeals and the appropriate federal courts. These cases will be printed in the following reports:

Idaho Reports
Pacific Reporter
Federal Supplement
Federal Reporter
United States Supreme Court Reports, Lawyers' Edition

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

| | |
|----------|----------------------------------|
| I.R.C.P. | Idaho Rules of Civil Procedure |
| I.R.E. | Idaho Rules of Evidence |
| I.C.R. | Idaho Criminal Rules |
| M.C.R. | Misdemeanor Criminal Rules |
| I.I.R. | Idaho Infraction Rules |
| I.J.R. | Idaho Juvenile Rules |
| I.C.A.R. | Idaho Court Administrative Rules |
| I.A.R. | Idaho Appellate Rules |

If you have any questions or suggestions concerning the Idaho Code, please write or call toll free 1-800-833-9844, fax toll free at 1-800-643-1280, or email us at customer.support@bender.com.

Visit our website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer service, and other company information.

LexisNexis
Attn: Customer Service
1275 Broadway
Albany, NY 12204-2694



Digitized by the Internet Archive
in 2013

USER'S GUIDE

To assist the legal profession and the layperson in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of this set

ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE

Article 3 .. § 22 of the Idaho State Constitution provides: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

Section 67-510 Idaho Code provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law."

Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

This table is given in order that the effective date of acts, not carrying an emergency or which do not specify an effective date, may be determined with a minimum of delay.

| Year | Adjournment Date |
|-----------------------|-------------------|
| 1921 | March 5, 1921 |
| 1923 | March 9, 1923 |
| 1925 | March 5, 1925 |
| 1927 | March 3, 1927 |
| 1929 | March 7, 1929 |
| 1931 | March 5, 1931 |
| 1931 (E.S.) | March 13, 1931 |
| 1933 | March 1, 1933 |
| 1933 (E.S.) | June 22, 1933 |
| 1935 | March 8, 1935 |
| 1935 (1st E.S.) | March 20, 1935 |
| 1935 (2nd E.S.) | July 10, 1935 |
| 1935 (3rd E.S.) | July 31, 1936 |
| 1937 | March 6, 1937 |
| 1937 (E.S.) | November 30, 1938 |
| 1939 | March 2, 1939 |
| 1941 | March 8, 1941 |
| 1943 | February 28, 1943 |
| 1944 (1st E.S.) | March 1, 1944 |
| 1944 (2nd E.S.) | March 4, 1944 |
| 1945 | March 9, 1945 |
| 1946 (1st E.S.) | March 7, 1946 |
| 1947 | March 7, 1947 |
| 1949 | March 4, 1949 |
| 1950 (E.S.) | February 25, 1950 |
| 1951 | March 12, 1951 |
| 1952 (E.S.) | January 16, 1952 |

| | |
|-----------------------|------------------|
| 1953 | March 6, 1953 |
| 1955 | March 5, 1955 |
| 1957 | March 16, 1957 |
| 1959 | March 9, 1959 |
| 1961 | March 2, 1961 |
| 1961 (1st E.S.) | August 4, 1961 |
| 1963 | March 19, 1963 |
| 1964 (E.S.) | August 1, 1964 |
| 1965 | March 18, 1965 |
| 1965 (1st E.S.) | March 25, 1965 |
| 1966 (2nd E.S.) | March 5, 1966 |
| 1966 (3rd E.S.) | March 17, 1966 |
| 1967 | March 31, 1967 |
| 1967 (1st E.S.) | June 23, 1967 |
| 1968 (2nd E.S.) | February 9, 1968 |
| 1969 | March 27, 1969 |
| 1970 | March 7, 1970 |
| 1971 | March 19, 1971 |
| 1971 (E.S.) | April 8, 1971 |
| 1972 | March 25, 1972 |
| 1973 | March 13, 1973 |
| 1974 | March 30, 1974 |
| 1975 | March 22, 1975 |
| 1976 | March 19, 1976 |
| 1977 | March 21, 1977 |
| 1978 | March 18, 1978 |
| 1979 | March 26, 1979 |
| 1980 | March 31, 1980 |
| 1981 | March 27, 1981 |
| 1981 (E.S.) | July 21, 1981 |
| 1982 | March 24, 1982 |
| 1983 | April 14, 1983 |
| 1983 (E.S.) | May 11, 1983 |
| 1984 | March 31, 1984 |
| 1985 | March 13, 1985 |
| 1986 | March 28, 1986 |
| 1987 | April 1, 1987 |
| 1988 | March 31, 1988 |
| 1989 | March 29, 1989 |
| 1990 | March 30, 1990 |
| 1991 | March 30, 1991 |
| 1992 | April 3, 1992 |
| 1992 (E.S.) | July 28, 1992 |
| 1993 | March 27, 1993 |
| 1994 | April 1, 1994 |
| 1995 | March 17, 1995 |
| 1996 | March 15, 1996 |
| 1997 | March 19, 1997 |

| | |
|------------------|-----------------|
| 1998 | March 23, 1998 |
| 1999 | March 19, 1999 |
| 2000 | April 5, 2000 |
| 2001 | March 30, 2001 |
| 2002 | March 15, 2002 |
| 2003 | May 3, 2003 |
| 2004 | March 20, 2004 |
| 2005 | April 6, 2005 |
| 2006 | April 11, 2006 |
| 2006 (E.S) | August 25, 2006 |
| 2007 | March 30, 2007 |
| 2008 | April 2, 2008 |
| 2009 | May 8, 2009 |
| 2010 | March 29, 2010 |
| 2011 | April 7, 2011 |
| 2012 | March 29, 2012 |
| 2013 | April 4, 2013 |

TABLE OF CONTENTS

TITLE 28

COMMERCIAL TRANSACTIONS

| Chapter | Sections |
|--|--------------------------|
| 9. Secured Transactions | §§ 28-9-101 — 28-9-809 |
| 10. Uniform Commercial Code — Effective Date and Repealer | §§ 28-10-101 — 28-10-104 |
| 11. Artists and Art Dealers | §§ 28-11-101 — 28-11-106 |
| 12. Uniform Commercial Code — Leases | §§ 28-12-101 — 28-12-532 |
| 13 - 20. | [Reserved] |
| 21. Indorsement of Nonnegotiable Instruments | §§ 28-21-101 — 28-21-103 |
| 22. Money of Account and Interest | §§ 28-22-101 — 28-22-108 |
| 23. Repurchase of Farm Machinery and Equipment Upon Termination of Contract | §§ 28-23-101 — 28-23-113 |
| 24. Agreements Between Suppliers and Dealers of Farm Equipment | §§ 28-24-101 — 28-24-112 |
| 25 - 30. | [Reserved] |
| 31. Uniform Consumer Credit Code — General Provisions and Definitions .. | [Repealed] |
| 32. Uniform Consumer Credit Code — Credit Sales | [Repealed] |
| 33. Uniform Consumer Credit Code — Loans | [Repealed] |
| 34. Uniform Consumer Credit Code — Insurance | [Repealed] |
| 35. Uniform Consumer Credit Code — Remedies and Penalties | [Repealed] |
| 36. Idaho Lease-Purchase Agreement Act | §§ 28-36-101 — 28-36-203 |
| 37, 38. | [Reserved] |
| 39. Effective Date and Repealer | [Repealed and Reserved] |
| 40. | [Reserved] |
| 41. General Provisions and Definitions | §§ 28-41-101 — 28-41-302 |
| 42. Finance Charges and Related Provisions | §§ 28-42-101 — 28-42-404 |
| 43. Regulation of Agreements and Practices | §§ 28-43-101 — 28-43-405 |
| 44. Insurance | §§ 28-44-101 — 28-44-401 |
| 45. Remedies and Penalties | §§ 28-45-101 — 28-45-402 |
| 46. Administration | §§ 28-46-101 — 28-46-509 |
| 47, 48. | [Reserved] |
| 49. Relationship to Other Laws, Effective Date, and Override of Federal Preemption | §§ 28-49-101 — 28-49-107 |
| 50. Uniform Electronic Transactions Act | §§ 28-50-101 — 28-50-120 |
| 51. Identity Theft | §§ 28-51-101 — 28-51-107 |
| 52. Credit Report Protection Act | §§ 28-52-101 — 28-52-109 |

TITLE 28

COMMERCIAL TRANSACTIONS

CHAPTER.

9. SECURED TRANSACTIONS, §§ 28-9-101 — 28-9-809.
10. UNIFORM COMMERCIAL CODE — EFFECTIVE DATE AND REPEALER, §§ 28-10-101 — 28-10-104.
11. ARTISTS AND ART DEALERS, §§ 28-11-101 — 28-11-106.
12. UNIFORM COMMERCIAL CODE — LEASES, §§ 28-12-101 — 28-12-532.
- 13 — 20. [RESERVED.]
21. INDORSEMENT OF NONNEGOTIABLE INSTRUMENTS, §§ 28-21-101 — 28-21-103.
22. MONEY OF ACCOUNT AND INTEREST, §§ 28-22-101 — 28-22-112.
23. REPURCHASE OF FARM MACHINERY AND EQUIPMENT UPON TERMINATION OF CONTRACT, §§ 28-23-101 — 28-23-113.
24. AGREEMENTS BETWEEN SUPPLIERS AND DEALERS OF FARM EQUIPMENT, §§ 28-24-101 — 28-24-108.
- 25 — 30. [RESERVED.]
31. UNIFORM CONSUMER CREDIT CODE — GENERAL PROVISIONS AND DEFINITIONS. [REPEALED.]
32. UNIFORM CONSUMER CREDIT CODE — CREDIT SALES. [REPEALED.]
33. UNIFORM CONSUMER CREDIT CODE — LOANS. [REPEALED.]
34. UNIFORM CONSUMER CREDIT CODE — INSURANCE. [REPEALED.]

CHAPTER.

35. UNIFORM CONSUMER CREDIT CODE — REMEDIES AND PENALTIES. [REPEALED.]
36. IDAHO LEASE-PURCHASE AGREEMENT ACT, §§ 28-36-101 — 28-36-203.
- 37, 38. RESERVED.]
39. EFFECTIVE DATE AND REPEALER. [REPEALED AND RESERVED.]
40. [RESERVED.]
41. GENERAL PROVISIONS AND DEFINITIONS, §§ 28-41-101 — 28-41-302.
42. FINANCE CHARGES AND RELATED PROVISIONS, §§ 28-42-101 — 28-42-404.
43. REGULATION OF AGREEMENTS AND PRACTICES, §§ 28-43-101 — 28-43-405.
44. INSURANCE, §§ 28-44-101 — 28-44-401.
45. REMEDIES AND PENALTIES, §§ 28-45-101 — 28-45-402.
46. ADMINISTRATION, §§ 28-46-101 — 28-46-509.
- 47, 48. [RESERVED.]
49. RELATIONSHIP TO OTHER LAWS, EFFECTIVE DATE, AND OVERRIDE OF FEDERAL PREEMPTION, §§ 28-49-101 — 28-49-107.
50. UNIFORM ELECTRONIC TRANSACTIONS ACT, §§ 28-50-101 — 28-50-120.
51. IDENTITY THEFT, §§ 28-51-101 — 28-51-107.
52. CREDIT REPORT PROTECTION ACT, §§ 28-52-101 — 28-52-109.

[For Title 28, Chapters 1 to 8, see the preceding volume]

CHAPTER 9

SECURED TRANSACTIONS

PART 1. GENERAL PROVISIONS

SECTION.

- 28-9-101. Short title.
- 28-9-102. Definitions and index of definitions.
- 28-9-103. Purchase-money security interest — Application of payments — Burden of establishing.
- 28-9-104. Control of deposit account.
- 28-9-105. Control of electronic chattel paper.
- 28-9-106. Control of investment property.
- 28-9-107. Control of letter of credit right.
- 28-9-108. Sufficiency of description.

SECTION.

- 28-9-109. Scope.
- 28-9-110. Security interests arising under chapter 2 or 12, title 28, Idaho code.
- 28-9-111. [Repealed.]
- 28-9-112 — 28-9-116. [Repealed.]

PART 2. EFFECTIVENESS OF SECURITY AGREEMENT — ATTACHMENT OF SECURITY INTEREST — RIGHTS OF PARTIES TO SECURITY AGREEMENT

- 28-9-201. General effectiveness of security agreement.

SECTION.

- 28-9-202. Title to collateral immaterial.
- 28-9-203. Attachment and enforceability of security interest — Proceeds — Supporting obligations — Formal requisites.
- 28-9-204. After-acquired property — Future advances.
- 28-9-205. Use or disposition of collateral permissible.
- 28-9-206. Security interest arising in purchase or delivery of financial asset.
- 28-9-207. Rights and duties of secured party having possession or control of collateral.
- 28-9-208. Additional duties of secured party having control of collateral.
- 28-9-209. Duties of secured party if account debtor has been notified of assignment.
- 28-9-210. Request for accounting — Request regarding list of collateral or statement of account.

PART 3. PERFECTION AND PRIORITY

- 28-9-301. Law governing perfection and priority of security interests.
- 28-9-302. Law governing perfection and priority of agricultural liens.
- 28-9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title.
- 28-9-304. Law governing perfection and priority of security interests in deposit accounts.
- 28-9-305. Law governing perfection and priority of security interests in investment property.
- 28-9-306. Law governing perfection and priority of security interests in letter of credit rights.
- 28-9-307. Location of debtor.
- 28-9-308. When security interest or agricultural lien is perfected — Continuity of perfection.
- 28-9-309. Security interest perfected upon attachment.
- 28-9-310. When filing required to perfect security interest or agricultural lien — Security interests and agricultural liens to which filing provisions do not apply.
- 28-9-311. Perfection of security interests in property subject to certain statutes, regulations and treaties.
- 28-9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter of credit rights and

SECTION.

- money — Perfection by permissive filing — Temporary perfection without filing or transfer of possession.
- 28-9-313. When possession by or delivery to secured party perfects security interest without filing.
- 28-9-314. Perfection by control.
- 28-9-315. Secured party's rights on disposition of collateral and in proceeds.
- 28-9-316. Effect of change in governing law.
- 28-9-317. Interests that take priority over or take free of security interest or agricultural lien.
- 28-9-318. No interest retained in right to payment that is sold — Rights and title of seller of account or chattel paper with respect to creditors and purchasers.
- 28-9-319. Rights and title of consignee with respect to creditors and purchasers.
- 28-9-320. Buyer of goods.
- 28-9-321. Licensee of general intangible and lessee of goods in ordinary course of business.
- 28-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.
- 28-9-322A. Security interests in crops for provision of agricultural chemicals.
- 28-9-323. Future advances.
- 28-9-324. Priority of purchase-money security interests.
- 28-9-325. Priority of security interests in transferred collateral.
- 28-9-326. Priority of security interests created by new debtor.
- 28-9-327. Priority of security interests in deposit account.
- 28-9-328. Priority of security interests in investment property.
- 28-9-329. Priority of security interests in letter of credit right.
- 28-9-330. Priority of purchaser of chattel paper or instrument.
- 28-9-331. Priority of rights of purchasers of instruments, documents and securities under other chapters — Priority of interests in financial assets and security entitlements under chapter 8.
- 28-9-332. Transfer of money — Transfer of funds from deposit account.
- 28-9-333. Priority of certain liens arising by operation of law.
- 28-9-334. Priority of security interests in fixtures and crops.
- 28-9-335. Accessions.
- 28-9-336. Commingled goods.

SECTION.

- 28-9-337. Priority of security interests in goods covered by certificate of title.
- 28-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.
- 28-9-339. Priority subject to subordination.
- 28-9-340. Effectiveness of right of recoupment or set-off against deposit account.
- 28-9-341. Bank's rights and duties with respect to deposit account.
- 28-9-342. Bank's right to refuse to enter into or disclose existence of control agreement.

PART 4. RIGHTS OF THIRD PARTIES

- 28-9-401. Alienability of debtor's rights.
- 28-9-402. Secured party not obligated on contract of debtor or in tort.
- 28-9-403. Agreement not to assert defenses against assignee.
- 28-9-404. Rights acquired by assignee — Claims and defenses against assignee.
- 28-9-405. Modification of assigned contract.
- 28-9-406. Discharge of account debtor — Notification of assignment — Identification and proof of assignment — Restrictions on assignment of accounts, chattel paper, payment intangibles and promissory notes ineffective.
- 28-9-407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest.
- 28-9-408. Restrictions on assignment of promissory notes, health care insurance receivables, and certain general intangibles ineffective.
- 28-9-409. Restrictions on assignment of letter of credit rights ineffective.

PART 5. FILING

- 28-9-501. Filing office.
- 28-9-502. Contents of financing statement — Record of mortgage as financing statement — Time of filing financing statement — Farm products.
- 28-9-503. Name of debtor and secured party.
- 28-9-504. Indication of collateral.
- 28-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.

SECTION.

- 28-9-506. Effect of errors or omissions.
- 28-9-507. Effect of certain events on effectiveness of financing statement.
- 28-9-508. Effectiveness of financing statement if new debtor becomes bound by security agreement.
- 28-9-509. Persons entitled to file a record.
- 28-9-510. Effectiveness of filed record.
- 28-9-511. Secured party of record.
- 28-9-512. Amendment of financing statement.
- 28-9-513. Termination statement.
- 28-9-514. Assignment of powers of secured party of record.
- 28-9-515. Duration and effectiveness of financing statement — Effect of lapsed financing statement.
- 28-9-516. What constitutes filing — Effectiveness of filing.
- 28-9-516A. Filing officer duties.
- 28-9-517. Effect of indexing errors.
- 28-9-518. Claim concerning inaccurate or wrongfully filed record.
- 28-9-519. Numbering, maintaining, and indexing records — Communicating information provided in records.
- 28-9-520. Acceptance and refusal to accept record.
- 28-9-521. Uniform form of written financing statement and amendment.
- 28-9-522. Maintenance and destruction of records.
- 28-9-523. Information from filing office — Sale or license of records — Farm products — Master lists.
- 28-9-524. Delay by filing office.
- 28-9-525. Fees.
- 28-9-526. Filing office rules.

PART 6. DEFAULT

- 28-9-601. Rights after default — Judicial enforcement — Consignor or buyer of accounts, chattel paper, payment intangibles or promissory notes.
- 28-9-602. Waiver and variance of rights and duties.
- 28-9-603. Agreement on standards concerning rights and duties.
- 28-9-604. Procedure if security agreement covers real property or fixtures.
- 28-9-605. Unknown debtor or secondary obligor.
- 28-9-606. Time of default for agricultural lien.
- 28-9-607. Collection and enforcement by secured party.
- 28-9-608. Application of proceeds of collection or enforcement — Liabil-

SECTION.

- ity for deficiency and right to surplus.
- 28-9-609. Secured party's right to take possession after default.
- 28-9-610. Disposition of collateral after default.
- 28-9-611. Notification before disposition of collateral.
- 28-9-612. Timeliness of notification before disposition of collateral.
- 28-9-613. Contents and form of notification before disposition of collateral — General.
- 28-9-614. Contents and form of notification before disposition of collateral — Consumer goods transaction.
- 28-9-615. Application of proceeds of disposition — Liability for deficiency and right to surplus.
- 28-9-616. Explanation of calculation of surplus or deficiency.
- 28-9-617. Rights of transferee of collateral.
- 28-9-618. Rights and duties of certain secondary obligors.
- 28-9-619. Transfer of record or legal title.
- 28-9-620. Acceptance of collateral in full or partial satisfaction of obligation — Compulsory disposition of collateral.
- 28-9-621. Notification of proposal to accept collateral.
- 28-9-622. Effect of acceptance of collateral.
- 28-9-623. Right to redeem collateral.
- 28-9-624. Waiver.
- 28-9-625. Remedies for secured party's failure to comply with chapter.
- 28-9-626. Action in which deficiency or surplus is in issue.
- 28-9-627. Determination of whether conduct was commercially reasonable.

SECTION.

- 28-9-628. Nonliability and limitation on liability of secured party — Liability of secondary obligor.

PART 7. TRANSITION

- 28-9-701. [Reserved.]
- 28-9-702. Savings clause.
- 28-9-703. Security interest perfected before effective date.
- 28-9-704. Security interest unperfected before effective date.
- 28-9-705. Effectiveness of action taken before effective date.
- 28-9-706. When initial financing statement suffices to continue effectiveness of financing statement.
- 28-9-707. Amendment of preeffective-date financing statement.
- 28-9-708. Persons entitled to file initial financing statement or continuation statement.
- 28-9-709. Priority.

PART 8. TRANSITION PROVISIONS FOR 2011
AMENDMENTS

- 28-9-801. [Reserved.]
- 28-9-802. Savings clause.
- 28-9-803. Security interest perfected before effective date.
- 28-9-804. Security interest unperfected before effective date.
- 28-9-805. Effectiveness of action taken before effective date.
- 28-9-806. When initial financing statement suffices to continue effectiveness of financing statement.
- 28-9-807. Amendment of pre-effective-date financing statement.
- 28-9-808. Person entitled to file initial financing statement or continuation statement.
- 28-9-809. Priority.

PART 1. GENERAL PROVISIONS

28-9-101. Short title. — This chapter may be cited as “Uniform Commercial Code — Secured Transactions.”

History.

I.C., § 28-9-101, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-101, which comprised 1967, ch. 161, § 9-101, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The official comments in chapters 1 to 12 of

this title are copyrighted by the National Conference of Commissioners of Uniform State Laws and the American Law Institute and are reproduced by permission.

RESEARCH REFERENCES

Am. Jur. — 68A Am. Jur. 2d, Secured Transactions, § 102 et seq.

C.J.S. — 79 C.J.S., Secured Transactions, § 1 et seq.

A.L.R. — Punitive damages for wrongful seizure of chattel by one claiming security interest. 35 A.L.R.3d 1016.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller. 39 A.L.R.3d 518.

Consignment transactions under the Uniform Commercial Code. 40 A.L.R.3d 1078.

Priorities as between vendor's lien and subsequent title or security interest obtained in another state to which vehicle was removed. 42 A.L.R.3d 1168.

Repossession by secured seller as affecting his right on note or other obligation given as a down payment. 49 A.L.R.3d 364.

Burden of proof as to commercially reasonable disposition of collateral. 59 A.L.R.3d 369.

Failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 A.L.R.3d 401.

Priorities as between previously perfected security interest and repairman's lien on motor vehicle under Uniform Commercial Code. 69 A.L.R.3d 1162.

Equipment leases as security interest within Uniform Commercial Code § 1-201(37). 76 A.L.R.3d 11.

Consignment transactions under Uniform Commercial Code Article 9 on Secured Transactions. 58 A.L.R.6th 289.

OFFICIAL COMMENT

1. **Source.** This Article supersedes former Uniform Commercial Code (UCC) Article 9. As did its predecessor, it provides a comprehensive scheme for the regulation of security interests in personal property and fixtures. For the most part this Article follows the general approach and retains much of the terminology of former Article 9. In addition to describing many aspects of the operation and interpretation of this Article, these Comments explain the material changes that this Article makes to former Article 9. Former Article 9 superseded the wide variety of pre-UCC security devices. Unlike the Comments to former Article 9, however, these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments to former Article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this Article.

Citations to "Bankruptcy Code Section ____" in these Comments are to Title 11 of the United States Code as in effect on July 1, 2010.

2. **Background and History.** In 1990, the Permanent Editorial Board for the UCC with the support of its sponsors, The American Law Institute and the National Conference of Commissioners on Uniform State Laws, established a committee to study Article 9 of the UCC. The study committee issued its report as of December 1, 1992, recommending the creation of a drafting committee for the revision of Article 9 and also recommending numerous specific changes to Article 9. Organized in 1993, a drafting committee met fifteen times from 1993 to 1998. This Article was approved by its sponsors in 1998. This Article was conformed to revised Article 1 in

2001 and to amendments to Article 7 in 2003. The sponsors approved amendments to selected sections of this Article in 2010.

3. **Reorganization and Renumbering; Captions; Style.** This Article reflects a substantial reorganization of former Article 9 and renumbering of most sections. New Part 4 deals with several aspects of third-party rights and duties that are unrelated to perfection and priority. Some of these were covered by Part 3 of former Article 9. Part 5 deals with filing (covered by former Part 4) and Part 6 deals with default and enforcement (covered by former Part 5). Appendix I contains conforming revisions to other articles of the UCC, and Appendix II contains model provisions for production-money priority.

This Article also includes headings for the subsections as an aid to readers. Unlike section captions, which are part of the UCC, see Section 1-107, subsection headings are not a part of the official text itself and have not been approved by the sponsors. Each jurisdiction in which this Article is introduced may consider whether to adopt the headings as a part of the statute and whether to adopt a provision clarifying the effect, if any, to be given to the headings. This Article also has been conformed to current style conventions.

4. **Summary of Revisions.** Following is a brief summary of some of the more significant revisions of Article 9 that are included in the 1998 revision of this Article.

a. **Scope of Article 9.** This Article expands the scope of Article 9 in several respects.

Deposit accounts. Section 9-109 includes within this Article's scope deposit accounts as original collateral, except in consumer transactions. Former Article 9 dealt with deposit accounts only as proceeds of other collateral.

Sales of payment intangibles and promissory notes. Section 9-109 also includes within the scope of this Article most sales of “payment intangibles” (defined in Section 9-102 as general intangibles under which an account debtor’s principal obligation is monetary) and “promissory notes” (also defined in Section 9-102). Former Article 9 included sales of accounts and chattel paper, but not sales of payment intangibles or promissory notes. In its inclusion of sales of payment intangibles and promissory notes, this Article continues the drafting convention found in former Article 9; it provides that the sale of accounts, chattel paper, payment intangibles, or promissory notes creates a “security interest.” The definition of “account” in Section 9-102 also has been expanded to include various rights to payment that were general intangibles under former Article 9.

Health-care-insurance receivables. Section 9-109 narrows Article 9’s exclusion of interests in insurance policies by carving out of the exclusion “health-care-insurance receivables” (defined in Section 9-102). A health-care-insurance receivable is included within the definition of “account” in Section 9-102.

Nonpossessory statutory agricultural liens. Section 9-109 also brings nonpossessory statutory agricultural liens within the scope of Article 9.

Consignments. Section 9-109 provides that “true” consignments—bailments for the purpose of sale by the bailee—are security interests covered by Article 9, with certain exceptions. See Section 9-102 (defining “consignment”). Currently, many consignments are subject to Article 9’s filing requirements by operation of former Section 2-326.

Supporting obligations and property securing rights to payment. This Article also addresses explicitly (i) obligations, such as guaranties and letters of credit, that support payment or performance of collateral such as accounts, chattel paper, and payment intangibles, and (ii) any property (including real property) that secures a right to payment or performance that is subject to an Article 9 security interest. See Sections 9-203, 9-308.

Commercial tort claims. Section 9-109 expands the scope of Article 9 to include the assignment of commercial tort claims by narrowing the exclusion of tort claims generally. However, this Article continues to exclude tort claims for bodily injury and other non-business tort claims of a natural person. See Section 9-102 (defining “commercial tort claim”).

Transfers by States and governmental units of States. Section 9-109 narrows the exclusion of transfers by States and their governmental units. It excludes only transfers covered by another statute (other than a statute gener-

ally applicable to security interests) to the extent the statute governs the creation, perfection, priority, or enforcement of security interests.

Nonassignable general intangibles, promissory notes, health-care-insurance receivables, and letter-of-credit rights. This Article enables a security interest to attach to letter-of-credit rights, health-care-insurance receivables, promissory notes, and general intangibles, including contracts, permits, licenses, and franchises, notwithstanding a contractual or statutory prohibition against or limitation on assignment. This Article explicitly protects third parties against any adverse effect of the creation or attempted enforcement of the security interest. See Sections 9-408, 9-409.

Subject to Sections 9-408 and 9-409 and two other exceptions (Sections 9-406, concerning accounts, chattel paper, and payment intangibles, and 9-407, concerning interests in leased goods), Section 9-401 establishes a baseline rule that the inclusion of transactions and collateral within the scope of Article 9 has no effect on non-Article 9 law dealing with the alienability or inalienability of property. For example, if a commercial tort claim is nonassignable under other applicable law, the fact that a security interest in the claim is within the scope of Article 9 does not override the other applicable law’s effective prohibition of assignment.

b. Duties of Secured Party. This Article provides for expanded duties of secured parties.

Release of control. Section 9-208 imposes upon a secured party having control of a deposit account, investment property, or a letter-of-credit right the duty to release control when there is no secured obligation and no commitment to give value. Section 9-209 contains analogous provisions when an account debtor has been notified to pay a secured party.

Information. Section 9-210 expands a secured party’s duties to provide the debtor with information concerning collateral and the obligations that it secures.

Default and enforcement. Part 6 also includes some additional duties of secured parties in connection with default and enforcement. See, e.g., Section 9-616 (duty to explain calculation of deficiency or surplus in a consumer-goods transaction).

c. Choice of Law. The choice-of-law rules for the law governing perfection, the effect of perfection or nonperfection, and priority are found in Part 3, Subpart 1 (Sections 9-301 through 9-307). See also Section 9-316.

Where to file: Location of debtor. This Article changes the choice-of-law rule governing perfection (i.e., where to file) for most collateral to the law of the jurisdiction where the debtor

is located. See Section 9-301. Under former Article 9, the jurisdiction of the debtor's location governed only perfection and priority of a security interest in accounts, general intangibles, mobile goods, and, for purposes of perfection by filing, chattel paper and investment property.

Determining debtor's location. As a baseline rule, Section 9-307 follows former Section 9-103, under which the location of the debtor is the debtor's place of business (or chief executive office, if the debtor has more than one place of business). Section 9-307 contains three major exceptions. First, a "registered organization," such as a corporation or limited liability company, is located in the State under whose law the debtor is organized, e.g., a corporate debtor's State of incorporation. Second, an individual debtor is located at his or her principal residence. Third, there are special rules for determining the location of the United States and registered organizations organized under the law of the United States.

Location of non-U.S. debtors. If, applying the foregoing rules, a debtor is located in a jurisdiction whose law does not require public notice as a condition of perfection of a nonpossessory security interest, the entity is deemed located in the District of Columbia. See Section 9-307. Thus, to the extent that this Article applies to non-U.S. debtors, perfection could be accomplished in many cases by a domestic filing.

Priority. For tangible collateral such as goods and instruments, Section 9-301 provides that the law applicable to priority and the effect of perfection or nonperfection will remain the law of the jurisdiction where the collateral is located, as under former Section 9-103 (but without the confusing "last event" test). For intangible collateral, such as accounts, the applicable law for priority will be that of the jurisdiction in which the debtor is located.

Possessory security interests; agricultural liens. Perfection, the effect of perfection or nonperfection, and priority of a possessory security interest or an agricultural lien are governed by the law of the jurisdiction where the collateral subject to the security interest or lien is located. See Sections 9-301, 9-302.

Goods covered by certificates of title; deposit accounts; letter-of-credit rights; investment property. This Article includes several refinements to the treatment of choice-of-law matters for goods covered by certificates of title. See Section 9-303. It also provides special choice-of-law rules, similar to those for investment property under current Articles 8 and 9, for deposit accounts (Section 9-304), investment property (Section 9-305), and letter-of-credit rights (Section 9-306).

Change in applicable law. Section 9-316 addresses perfection following a change in applicable law.

d. Perfection. The rules governing perfection of security interests and agricultural liens are found in Part 3, Subpart 2 (Sections 9-308 through 9-316).

Deposit accounts; letter-of-credit rights. With certain exceptions, this Article provides that a security interest in a deposit account or a letter-of-credit right may be perfected only by the secured party's acquiring "control" of the deposit account or letter-of-credit right. See Sections 9-312, 9-314. Under Section 9-104, a secured party has "control" of a deposit account when, with the consent of the debtor, the secured party obtains the depository bank's agreement to act on the secured party's instructions (including when the secured party becomes the account holder) or when the secured party is itself the depository bank. The control requirements are patterned on Section 8-106, which specifies the requirements for control of investment property. Under Section 9-107, "control" of a letter-of-credit right occurs when the issuer or nominated person consents to an assignment of proceeds under Section 5-114.

Electronic chattel paper. Section 9-102 includes a new defined term: "electronic chattel paper." Electronic chattel paper is a record or records consisting of information stored in an electronic medium (i.e., it is not written). Perfection of a security interest in electronic chattel paper may be by control or filing. See Sections 9-105 (sui generis definition of control of electronic chattel paper), 9-312 (perfection by filing), 9-314 (perfection by control).

Investment property. The perfection requirements for "investment property" (defined in Section 9-102), including perfection by control under Section 9-106, remain substantially unchanged. However, a new provision in Section 9-314 is designed to ensure that a secured party retains control in "repledge" transactions that are typical in the securities markets.

Instruments, agricultural liens, and commercial tort claims. This Article expands the types of collateral in which a security interest may be perfected by filing to include instruments. See Section 9-312. Agricultural liens and security interests in commercial tort claims also are perfected by filing, under this Article. See Sections 9-308, 9-310.

Sales of payment intangibles and promissory notes. Although former Article 9 covered the outright sale of accounts and chattel paper, sales of most other types of receivables also are financing transactions to which Article 9 should apply. Accordingly, Section 9-102 expands the definition of "account" to include many types of receivables (including "health-care-insurance receivables," defined in Section 9-102) that former Article 9 classified as "general intangibles." It thereby subjects to Article 9's filing system sales of more types of

receivables than did former Article 9. Certain sales of payment intangibles—primarily bank loan participation transactions—should not be subject to the Article 9 filing rules. These transactions fall in a residual category of collateral, “payment intangibles” (general intangibles under which the account debtor’s principal obligation is monetary), the sale of which is exempt from the filing requirements of Article 9. See Sections 9-102, 9-109, 9-309 (perfection upon attachment). The perfection rules for sales of promissory notes are the same as those for sales of payment intangibles.

Possessory security interests. Several provisions of this Article address aspects of security interests involving a secured party or a third party who is in possession of the collateral. In particular, Section 9-313 resolves a number of uncertainties under former Section 9-305. It provides that a security interest in collateral in the possession of a third party is perfected when the third party acknowledges in an authenticated record that it holds for the secured party’s benefit. Section 9-313 also provides that a third party need not so acknowledge and that its acknowledgment does not impose any duties on it, unless it otherwise agrees. A special rule in Section 9-313 provides that if a secured party already is in possession of collateral, its security interest remains perfected by possession if it delivers the collateral to a third party and the collateral is accompanied by instructions to hold it for the secured party or to redeliver it to the secured party. Section 9-313 also clarifies the limited circumstances under which a security interest in goods covered by a certificate of title may be perfected by the secured party’s taking possession.

Automatic perfection. Section 9-309 lists various types of security interests as to which no public-notice step is required for perfection (e.g., purchase-money security interests in consumer goods other than automobiles). This automatic perfection also extends to a transfer of a health-care-insurance receivable to a health-care provider. Those transfers normally will be made by natural persons who receive health-care services; there is little value in requiring filing for perfection in that context. Automatic perfection also applies to security interests created by sales of payment intangibles and promissory notes. Section 9-308 provides that a perfected security interest in collateral supported by a “supporting obligation” (such as an account supported by a guaranty) also is a perfected security interest in the supporting obligation, and that a perfected security interest in an obligation secured by a security interest or lien on property (e.g., a real-property mortgage) also is a perfected security interest in the security interest or lien.

e. Priority; Special Rules for Banks and Deposit Accounts. The rules governing priority of security interests and agricultural liens are found in Part 3, Subpart 3 (Sections 9-317 through 9-342). This Article includes several new priority rules and some special rules relating to banks and deposit accounts (Sections 9-340 through 9-342).

Purchase-money security interests: General; consumer-goods transactions; inventory. Section 9-103 substantially rewrites the definition of purchase-money security interest (PMSI) (although the term is not formally “defined”). The substantive changes, however, apply only to non-consumer-goods transactions. (Consumer transactions and consumer-goods transactions are discussed below in Comment 4.j.) For non-consumer-goods transactions, Section 9-103 makes clear that a security interest in collateral may be (to some extent) both a PMSI as well as a non-PMSI, in accord with the “dual status” rule applied by some courts under former Article 9 (thereby rejecting the “transformation” rule). The definition provides an even broader conception of a PMSI in inventory, yielding a result that accords with private agreements entered into in response to the uncertainty under former Article 9. It also treats consignments as purchase-money security interests in inventory. Section 9-324 revises the PMSI priority rules, but for the most part without material change in substance. Section 9-324 also clarifies the priority rules for competing PMSIs in the same collateral.

Purchase-money security interests in livestock; agricultural liens. Section 9-324 provides a special PMSI priority, similar to the inventory PMSI priority rule, for livestock. Section 9-322 (which contains the baseline first-to-file-or-perfect priority rule) also recognizes special non-Article 9 priority rules for agricultural liens, which can override the baseline first-in-time rule.

Purchase-money security interests in software. Section 9-324 contains a new priority rule for a software purchase-money security interest. (Section 9-102 includes a definition of “software.”) Under Section 9-103, a software PMSI includes a PMSI in software that is used in goods that are also subject to a PMSI. (Note also that the definition of “chattel paper” has been expanded to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods.)

Investment property. The priority rules for investment property are substantially similar to the priority rules found in former Section 9-115, which was added in conjunction with the 1994 revisions to UCC Article 8. Under Section 9-328, if a secured party has control of investment property (Sections 8-106, 9-106), its security interest is senior to a security

interest perfected in another manner (e.g., by filing). Also under Section 9-328, security interests perfected by control generally rank according to the time that control is obtained or, in the case of a security entitlement or a commodity contract carried in a commodity account, the time when the control arrangement is entered into. This is a change from former Section 9-115, under which the security interests ranked equally. However, as between a securities intermediary's security interest in a security entitlement that it maintains for the debtor and a security interest held by another secured party, the securities intermediary's security interest is senior.

Deposit accounts. This Article's priority rules applicable to deposit accounts are found in Section 9-327. They are patterned on and are similar to those for investment property in former Section 9-115 and Section 9-328 of this Article. Under Section 9-327, if a secured party has control of a deposit account, its security interest is senior to a security interest perfected in another manner (i.e., as cash proceeds). Also under Section 9-327, security interests perfected by control rank according to the time that control is obtained, but as between a depositary bank's security interest and one held by another secured party, the depositary bank's security interest is senior. A corresponding rule in Section 9-340 makes a depositary bank's right of set-off generally senior to a security interest held by another secured party. However, if the other secured party becomes the depositary bank's customer with respect to the deposit account, then its security interest is senior to the depositary bank's security interest and right of set-off. Sections 9-327, 9-340.

Letter-of-credit rights. The priority rules for security interests in letter-of-credit rights are found in Section 9-329. They are somewhat analogous to those for deposit accounts. A security interest perfected by control has priority over one perfected in another manner (i.e., as a supporting obligation for the collateral in which a security interest is perfected). Security interests in a letter-of-credit right perfected by control rank according to the time that control is obtained. However, the rights of a transferee beneficiary or a nominated person are independent and superior to the extent provided in Section 5-114. See Section 9-109(c)(4).

Chattel paper and instruments. Section 9-330 is the successor to former Section 9-308. As under former Section 9-308, differing priority rules apply to purchasers of chattel paper who give new value and take possession (or, in the case of electronic chattel paper, obtain control) of the collateral depending on whether a conflicting security interest in the collateral is claimed merely as proceeds. The principal change relates to the role of knowl-

edge and the effect of an indication of a previous assignment of the collateral. Section 9-330 also affords priority to purchasers of instruments who take possession in good faith and without knowledge that the purchase violates the rights of the competing secured party. In addition, to qualify for priority, purchasers of chattel paper, but not of instruments, must purchase in the ordinary course of business.

Proceeds. Section 9-322 contains new priority rules that clarify when a special priority of a security interest in collateral continues or does not continue with respect to proceeds of the collateral. Other refinements to the priority rules for proceeds are included in Sections 9-324 (purchase-money security interest priority) and 9-330 (priority of certain purchasers of chattel paper and instruments).

Miscellaneous priority provisions. This Article also includes (i) clarifications of selected good-faith-purchase and similar issues (Sections 9-317, 9-331); (ii) new priority rules to deal with the "double debtor" problem arising when a debtor creates a security interest in collateral acquired by the debtor subject to a security interest created by another person (Section 9-325); (iii) new priority rules to deal with the problems created when a change in corporate structure or the like results in a new entity that has become bound by the original debtor's after-acquired property agreement (Section 9-326); (iv) a provision enabling most transferees of funds from a deposit account or money to take free of a security interest (Section 9-332); (v) substantially rewritten and refined priority rules dealing with accessions and commingled goods (Sections 9-335, 9-336); (vi) revised priority rules for security interests in goods covered by a certificate of title (Section 9-337); and (vii) provisions designed to ensure that security interests in deposit accounts will not extend to most transferees of funds on deposit or payees from deposit accounts and will not otherwise "clog" the payments system (Sections 9-341, 9-342).

Model provisions relating to production-money security interests. Appendix II to this Article contains model definitions and priority rules relating to "production-money security interests" held by secured parties who give new value used in the production of crops. Because no consensus emerged on the wisdom of these provisions during the drafting process, the sponsors make no recommendation on whether these model provisions should be enacted.

f. **Proceeds.** Section 9-102 contains an expanded definition of "proceeds" of collateral which includes additional rights and property that arise out of collateral, such as distributions on account of collateral and claims arising out of the loss or nonconformity of, defects

in, or damage to collateral. The term also includes collections on account of “supporting obligations,” such as guaranties.

g. Part 4: Additional Provisions Relating to Third-Party Rights. New Part 4 contains several provisions relating to the relationships between certain third parties and the parties to secured transactions. It contains new Sections 9-401 (replacing former Section 9-311) (alienability of debtor’s rights), 9-402 (replacing former Section 9-317) (secured party not obligated on debtor’s contracts), 9-403 (replacing former Section 9-206) (agreement not to assert defenses against assignee), 9-404, 9-405, and 9-406 (replacing former Section 9-318) (rights acquired by assignee, modification of assigned contract, discharge of account debtor, restrictions on assignment of account, chattel paper, promissory note, or payment intangible ineffective), 9-407 (replacing some provisions of former Section 2A-303) (restrictions on creation or enforcement of security interest in leasehold interest or lessor’s residual interest ineffective). It also contains new Sections 9-408 (restrictions on assignment of promissory notes, health-care-insurance receivables ineffective, and certain general intangibles ineffective) and 9-409 (restrictions on assignment of letter-of-credit rights ineffective), which are discussed above.

h. Filing. Part 5 (formerly Part 4) of Article 9 has been substantially rewritten to simplify the statutory text and to deal with numerous problems of interpretation and implementation that have arisen over the years.

Medium-neutrality. This Article is “medium-neutral”; that is, it makes clear that parties may file and otherwise communicate with a filing office by means of records communicated and stored in media other than on paper.

Identity of person who files a record; authorization. Part 5 is largely indifferent as to the person who effects a filing. Instead, it addresses whose authorization is necessary for a person to file a record with a filing office. The filing scheme does not contemplate that the identity of a “filer” will be a part of the searchable records. This approach is consistent with, and a necessary aspect of, eliminating signatures or other evidence of authorization from the system (except to the extent that filing offices may choose to employ authentication procedures in connection with electronic communications). As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is largely insignificant whether the secured party or another person files any given record.

Section 9-509 collects in one place most of the rules that determine when a record may

be filed. In general, the debtor’s authorization is required for the filing of an initial financing statement or an amendment that adds collateral. With one further exception, a secured party of record’s authorization is required for the filing of other amendments. The exception arises if a secured party has failed to provide a termination statement that is required because there is no outstanding secured obligation or commitment to give value. In that situation, a debtor is authorized to file a termination statement indicating that it has been filed by the debtor.

Financing statement formal requisites. The formal requisites for a financing statement are set out in Section 9-502. A financing statement must provide the name of the debtor and the secured party and an indication of the collateral that it covers. Sections 9-503 and 9-506 address the sufficiency of a name provided on a financing statement and clarify when a debtor’s name is correct and when an incorrect name is insufficient. Section 9-504 addresses the indication of collateral covered. Under Section 9-504, a super-generic description (e.g., “all assets” or “all personal property”) in a financing statement is a sufficient indication of the collateral. (Note, however, that a super-generic description is inadequate for purposes of a security agreement. See Sections 9-108, 9-203.) To facilitate electronic filing, this Article does not require that the debtor’s signature or other authorization appear on a financing statement. Instead, it prohibits the filing of unauthorized financing statements and imposes liability upon those who violate the prohibition. See Sections 9-509, 9-626.

Filing-office operations. Part 5 contains several provisions governing filing operations. First, it prohibits the filing office from rejecting an initial financing statement or other record for a reason other than one of the few that are specified. See Sections 9-520, 9-516. Second, the filing office is obliged to link all subsequent records (e.g., assignments, continuation statements, etc.) to the initial financing statement to which they relate. See Section 9-519. Third, the filing office may delete a financing statement and related records from the files no earlier than one year after lapse (lapse normally is five years after the filing date), and then only if a continuation statement has not been filed. See Sections 9-515, 9-519, 9-522. Thus, a financing statement and related records would be discovered by a search of the files even after the filing of a termination statement. This approach helps eliminate filing-office discretion and also eases problems associated with multiple secured parties and multiple partial assignments. Fourth, Part 5 mandates performance standards for filing offices. See Sections 9-519, 9-520, 9-523. Fifth, it provides for the

promulgation of filing-office rules to deal with details best left out of the statute and requires the filing office to submit periodic reports. See Sections 9-526, 9-527.

Defaulting or missing secured parties and fraudulent filings. In some areas of the country, serious problems have arisen from fraudulent financing statements that are filed against public officials and other persons. This Article addresses the fraud problem by providing the opportunity for a debtor to file a termination statement when a secured party wrongfully refuses or fails to provide a termination statement. See Section 9-509. This opportunity also addresses the problem of secured parties that simply disappear through mergers or liquidations. In addition, Section 9-518 affords a statutory method by which a debtor who believes that a filed record is inaccurate or was wrongfully filed may indicate that fact in the files, albeit without affecting the efficacy, if any, of the challenged record.

Extended period of effectiveness for certain financing statements. Section 9-515 contains an exception to the usual rule that financing statements are effective for five years unless a continuation statement is filed to continue the effectiveness for another five years. Under that section, an initial financing statement filed in connection with a "public-finance transaction" or a "manufactured-home transaction" (terms defined in Section 9-102) is effective for 30 years.

National form of financing statement and related forms. Section 9-521 provides for uniform, national written forms of financing statements and related written records that must be accepted by a filing office that accepts written records.

i. Default and Enforcement. Part 6 of Article 9 extensively revises former Part 5. Provisions relating to enforcement of consumer-goods transactions and consumer transactions are discussed in Comment 4.j.

Debtor, secondary obligor; waiver. Section 9-602 clarifies the identity of persons who have rights and persons to whom a secured party owes specified duties under Part 6. Under that section, the rights and duties are enjoyed by and run to the "debtor," defined in Section 9-102 to mean any person with a non-lien property interest in collateral, and to any "obligor." However, with one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties concerned affect non-debtor obligors only if they are "secondary obligors." "Secondary obligor" is defined in Section 9-102 to include one who is secondarily obligated on the secured obligation, e.g., a guarantor, or one who has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. However, under Section 9-628,

the secured party is relieved from any duty or liability to any person unless the secured party knows that the person is a debtor or obligor. Resolving an issue on which courts disagreed under former Article 9, this Article generally prohibits waiver by a secondary obligor of its rights and a secured party's duties under Part 6. See Section 9-602. However, Section 9-624 permits a secondary obligor or debtor to waive the right to notification of disposition of collateral and, in a non-consumer transaction, the right to redeem collateral, if the secondary obligor or debtor agrees to do so after default.

Rights of collection and enforcement of collateral. Section 9-607 explains in greater detail than former 9-502 the rights of a secured party who seeks to collect or enforce collateral, including accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depository bank holding a security interest in a deposit account maintained with the depository bank. Section 9-607 relates solely to the rights of a secured party *vis-a-vis* a debtor with respect to collections and enforcement. It does not affect the rights or duties of third parties, such as account debtors on collateral, which are addressed elsewhere (e.g., Section 9-406). Section 9-608 clarifies the manner in which proceeds of collection or enforcement are to be applied.

Disposition of collateral: Warranties of title. Section 9-610 imposes on a secured party who disposes of collateral the warranties of title, quiet possession, and the like that are otherwise applicable under other law. It also provides rules for the exclusion or modification of those warranties.

Disposition of collateral: Notification, application of proceeds, surplus and deficiency, other effects. Section 9-611 requires a secured party to give notification of a disposition of collateral to other secured parties and lienholders who have filed financing statements against the debtor covering the collateral. (That duty was eliminated by the 1972 revisions to Article 9.) However, that section relieves the secured party from that duty when the secured party undertakes a search of the records and a report of the results is unreasonably delayed. Section 9-613, which applies only to non-consumer transactions, specifies the contents of a sufficient notification of disposition and provides that a notification sent 10 days or more before the earliest time for disposition is sent within a reasonable time. Section 9-615 addresses the application of proceeds of disposition, the entitlement of a debtor to any surplus, and the liability of an obligor for any deficiency. Section 9-619 clarifies the effects of a disposition by a secured party, including the rights of transferees of the collateral.

Rights and duties of secondary obligor. Section 9-618 provides that a secondary obligor obtains the rights and assumes the duties of a secured party if the secondary obligor receives an assignment of a secured obligation, agrees to assume the secured party's rights and duties upon a transfer to it of collateral, or becomes subrogated to the rights of the secured party with respect to the collateral. The assumption, transfer, or subrogation is not a disposition of collateral under Section 9-610, but it does relieve the former secured party of further duties. Former Section 9-504(5) did not address whether a secured party was relieved of its duties in this situation.

Transfer of record or legal title. Section 9-619 contains a new provision making clear that a transfer of record or legal title to a secured party is not of itself a disposition under Part 6. This rule applies regardless of the circumstances under which the transfer of title occurs.

Strict foreclosure. Section 9-620, unlike former Section 9-505, permits a secured party to accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured. This right of strict foreclosure extends to intangible as well as tangible property. Section 9-622 clarifies the effects of an acceptance of collateral on the rights of junior claimants. It rejects the approach taken by some courts—deeming a secured party to have constructively retained collateral in satisfaction of the secured obligations—in the case of a secured party's unreasonable delay in the disposition of collateral. Instead, unreasonable delay is relevant when determining whether a disposition under Section 9-610 is commercially reasonable.

Effect of noncompliance: "Rebuttable presumption" test. Section 9-626 adopts the "rebuttable presumption" test for the failure of a secured party to proceed in accordance with certain provisions of Part 6. (As discussed in Comment 4.j., the test does not necessarily apply to consumer transactions.) Under this approach, the deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition and the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with Part 6 (e.g., in a commercially reasonable manner). For non-consumer transactions, Section 9-626 rejects the "absolute bar" test that some courts have imposed; that approach bars a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance.

"Low-price" dispositions: Calculation of deficiency and surplus. Section 9-615(f) addresses the problem of procedurally regular dispositions that fetch a low price. Subsection

(f) provides a special method for calculating a deficiency if the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought." ("Person related to" is defined in Section 9-102.) In these situations there is reason to suspect that there may be inadequate incentives to obtain a better price. Consequently, instead of calculating a deficiency (or surplus) based on the actual net proceeds, the deficiency (or surplus) would be calculated based on the proceeds that would have been received in a disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor.

j. Consumer Goods, Consumer-Goods Transactions, and Consumer Transactions. This Article (including the accompanying conforming revisions (see Appendix I)) includes several special rules for "consumer goods," "consumer transactions," and "consumer-goods transactions." Each term is defined in Section 9-102.

(i) Revised Sections 2-502 and 2-716 provide a buyer of consumer goods with enhanced rights to possession of the goods, thereby accelerating the opportunity to achieve "buyer in ordinary course of business" status under Section 1-201.

(ii) Section 9-103(e) (allocation of payments for determining extent of purchase-money status), (f) (purchase-money status not affected by cross-collateralization, refinancing, restructuring, or the like), and (g) (secured party has burden of establishing extent of purchase-money status) do not apply to consumer-goods transactions. Sections 9-103 also provides that the limitation of those provisions to transactions other than consumer-goods transactions leaves to the courts the proper rules for consumer-goods transactions and prohibits the courts from drawing inferences from that limitation.

(iii) Section 9-108 provides that in a consumer transaction a description of consumer goods, a security entitlement, securities account, or commodity account "only by [UCC-defined] type of collateral" is not a sufficient collateral description in a security agreement.

(iv) Sections 9-403 and 9-404 make effective the Federal Trade Commission's anti-holder-in-due-course rule (when applicable), 16 C.F.R. Part 433, even in the absence of the required legend.

(v) The 10-day safe-harbor for notification of a disposition provided by Section 9-612 does not apply in a consumer transaction.

(vi) Section 9-613 (contents and form of notice of disposition) does not apply to a consumer-goods transaction.

(vii) Section 9-614 contains special requirements for the contents of a notification of disposition and a safe-harbor, “plain English” form of notification, for consumer-goods transactions.

(viii) Section 9-616 requires a secured party in a consumer-goods transaction to provide a debtor with a notification of how it calculated a deficiency at the time it first undertakes to collect a deficiency.

(ix) Section 9-620 prohibits partial strict foreclosure with respect to consumer goods collateral and, unless the debtor agrees to waive the requirement in an authenticated record after default, in certain cases requires the secured party to dispose of consumer goods collateral which has been repossessed.

(x) Section 9-626 (“rebuttable presumption” rule) does not apply to a consumer transaction. Section 9-626 also provides that its limitation to transactions other than consumer transactions leaves to the courts the proper rules for consumer transactions and prohibits the courts from drawing inferences from that limitation.

k. **Good Faith.** Section 9-102 contains a new definition of “good faith” that includes not only “honesty in fact” but also “the observance of reasonable commercial standards of fair dealing.” The definition is similar to the ones adopted in connection with other, recently completed revisions of the UCC.

l. **Transition Provisions.** Part 7 (Sections 9-701 through 9-707) contains transition provisions. Transition from former Article 9 to this Article will be particularly challenging in view of its expanded scope, its modification of

choice-of-law rules for perfection and priority, and its expansion of the methods of perfection.

m. **Conforming and Related Amendments to Other UCC Articles.** Appendix I contains several proposed revisions to the provisions and Comments of other UCC articles. For the most part the revisions are explained in the Comments to the proposed revisions. Cross-references in other UCC articles to sections of Article 9 also have been revised.

Article 1. Revised Section 1-201 contains revisions to the definitions of “buyer in ordinary course of business,” “purchaser,” and “security interest.”

Articles 2 and 2A. Sections 2-210, 2-326, 2-502, 2-716, 2A-303, and 2A-307 have been revised to address the intersection between Articles 2 and 2A and Article 9.

Article 5. New Section 5-118 is patterned on Section 4-210. It provides for a security interest in documents presented under a letter of credit in favor of the issuer and a nominated person on the letter of credit.

Article 8. Revisions to Section 8-106, which deals with “control” of securities and security entitlements, conform it to Section 8-302, which deals with “delivery.” Revisions to Section 8-110, which deals with a “securities intermediary’s jurisdiction,” conform it to the revised treatment of a “commodity intermediary’s jurisdiction” in Section 9-305. Sections 8-301 and 8-302 have been revised for clarification. Section 8-510 has been revised to conform it to the revised priority rules of Section 9-328. Several Comments in Article 8 also have been revised.

28-9-102. Definitions and index of definitions. — (a) In this chapter:

- (1) “Accession” means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.
- (2) “Account,” except as used in “account for,” means a right to payment of a monetary obligation, whether or not earned by performance: (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of; (ii) for services rendered or to be rendered; (iii) for a policy of insurance issued or to be issued; (iv) for a secondary obligation incurred or to be incurred; (v) for energy provided or to be provided; (vi) for the use or hire of a vessel under a charter or other contract; (vii) arising out of the use of a credit or charge card or information contained on or for use with the card; or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or a person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health care insurance receivables. The term does not include: (i) rights to payment evidenced by chattel paper or an instrument; (ii) commercial tort claims; (iii) deposit accounts; (iv) investment property; (v) letter of credit rights or letters of credit; or (vi)

rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(3) "Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(4) "Accounting," except as used in "accounting for," means a record:

(A) authenticated by a secured party;

(B) indicating the aggregate unpaid secured obligations as of a date not more than thirty-five (35) days earlier or thirty-five (35) days later than the date of the record; and

(C) identifying the components of the obligations in reasonable detail.

(5) "Agricultural lien" means an interest, other than a security interest, in farm products:

(A) which secures payment or performance of an obligation for:

(i) goods or services furnished in connection with a debtor's farming operation; or

(ii) rent on real property leased by a debtor in connection with its farming operation;

(B) which is created by statute in favor of a person that:

(i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or

(ii) leased real property to a debtor in connection with the debtor's farming operation; and

(C) whose effectiveness does not depend on the person's possession of the personal property.

(6) "As-extracted collateral" means:

(A) oil, gas, or other minerals that are subject to a security interest that:

(i) is created by a debtor having an interest in the minerals before extraction; and

(ii) attaches to the minerals as extracted; or

(B) accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

(7) "Authenticate" means:

(A) to sign; or

(B) with the intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol or process.

(8) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions and trust companies.

(9) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.

(10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining

priority over the rights of a lien creditor with respect to the collateral. The term includes another record maintained as an alternative to a certificate of title by the governmental unit that issues certificates of title if a statute permits the security interest in question to be indicated on the record as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

(11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include: (i) charters or other contracts involving the use or hire of a vessel; or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:

(A) proceeds to which a security interest attaches;

(B) accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) goods that are the subject of a consignment.

(13) "Commercial tort claim" means a claim arising in tort with respect to which:

(A) the claimant is an organization; or

(B) the claimant is an individual and the claim:

(i) arose in the course of the claimant's business or profession; and

(ii) does not include damages arising out of personal injury to or the death of an individual.

(14) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(15) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:

(A) traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

(B) traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.

(16) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

(17) "Commodity intermediary" means a person that:

- (A) is registered as a futures commission merchant under federal commodities law; or
 - (B) in the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.
- (18) "Communicate" means:
- (A) to send a written or other tangible record;
 - (B) to transmit a record by any means agreed upon by the persons sending and receiving the record; or
 - (C) in the case of transmission of a record to or by a filing office, to transmit a record by any means prescribed by filing office rule.
- (19) "Consignee" means a merchant to which goods are delivered in a consignment.
- (20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:
- (A) the merchant:
 - (i) deals in goods of that kind under a name other than the name of the person making delivery;
 - (ii) is not an auctioneer; and
 - (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others;
 - (B) with respect to each delivery, the aggregate value of the goods is one thousand dollars (\$1,000) or more at the time of delivery;
 - (C) the goods are not consumer goods immediately before delivery; and
 - (D) the transaction does not create a security interest that secures an obligation.
- (21) "Consignor" means a person that delivers goods to a consignee in a consignment.
- (22) "Consumer debtor" means a debtor in a consumer transaction.
- (23) "Consumer goods" means goods that are used or bought for use primarily for personal, family or household purposes.
- (24) "Consumer goods transaction" means a consumer transaction in which:
- (A) an individual incurs an obligation primarily for personal, family or household purposes; and
 - (B) a security interest in consumer goods secures the obligation.
- (25) "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family or household purposes.
- (26) "Consumer transaction" means a transaction in which: (i) an individual incurs an obligation primarily for personal, family or household purposes; (ii) a security interest secures the obligation; and (iii) the collateral is held or acquired primarily for personal, family or household purposes. The term includes consumer goods transactions.
- (27) "Continuation statement" means an amendment of a financing statement which:
- (A) identifies, by its file number, the initial financing statement to which it relates; and

(B) indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

(28) "Debtor" means:

(A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) a seller of accounts, chattel paper, payment intangibles or promissory notes; or

(C) a consignee.

(29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(30) "Document" means a document of title or a receipt of the type described in section 28-7-201(b), Idaho Code.

(31) "Electronic chattel paper" means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.

(32) "Encumbrance" means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.

(33) "Equipment" means goods other than inventory, farm products or consumer goods.

(34) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

(A) crops grown, growing, or to be grown, including:

(i) crops produced on trees, vines and bushes; and

(ii) aquatic goods produced in aquacultural operations;

(B) livestock, born or unborn, including aquatic goods produced in aquacultural operations;

(C) supplies used or produced in a farming operation; or

(D) products of crops or livestock in their unmanufactured states.

(35) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.

(36) "File number" means the number assigned to an initial financing statement pursuant to section 28-9-519(a), Idaho Code.

(37) "Filing office" means an office designated in section 28-9-501, Idaho Code, as the place to file a financing statement.

(38) "Filing office rule" means a rule adopted pursuant to section 28-9-526, Idaho Code.

(39) "Financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(40) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying section 28-9-502(a) and (b), Idaho Code. The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(41) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.

(42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter of credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(43) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(44) "Goods" means all things that are movable when a security interest attaches. The term includes: (i) fixtures; (ii) standing timber that is to be cut and removed under a conveyance or contract for sale; (iii) the unborn young of animals; (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines or bushes; and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if: (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods; or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter of credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(45) "Governmental unit" means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a state, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(46) "Health care insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health care goods or services provided or to be provided.

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include: (i) investment property; (ii) letters of credit; or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

(48) "Inventory" means goods, other than farm products, which:

(A) are leased by a person as lessor;

(B) are held by a person for sale or lease or to be furnished under a contract of service;

(C) are furnished by a person under a contract of service; or

(D) consist of raw materials, work in process, or materials used or consumed in a business.

(49) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract or commodity account.

(50) "Jurisdiction of organization," with respect to a registered organization, means the jurisdiction under whose law the organization is formed or organized.

(51) "Letter of credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(52) "Lien creditor" means:

- (A) a creditor that has acquired a lien on the property involved by attachment, levy, or the like;
- (B) an assignee for benefit of creditors from the time of assignment;
- (C) a trustee in bankruptcy from the date of the filing of the petition; or
- (D) a receiver in equity from the time of appointment.

(53) "Manufactured home" means a structure, transportable in one (1) or more sections, which, in the traveling mode, is eight (8) body feet or more in width or forty (40) body feet or more in length, or, when erected on site, is three hundred twenty (320) or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States secretary of housing and urban development and complies with the standards established under title 42 of the United States Code.

(54) "Manufactured home transaction" means a secured transaction:

- (A) that creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or
- (B) in which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

(55) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.

(56) "New debtor" means a person that becomes bound as debtor under section 28-9-203(d), Idaho Code, by a security agreement previously entered into by another person.

(57) "New value" means: (i) money; (ii) money's worth in property, services or new credit; or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(58) "Noncash proceeds" means proceeds other than cash proceeds.

(59) "Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral: (i) owes payment or other performance of the obligation; (ii) has provided property

other than the collateral to secure payment or other performance of the obligation; or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(60) "Original debtor," except as used in section 28-9-310(c), Idaho Code, means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under section 28-9-203(d), Idaho Code.

(61) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.

(62) "Person related to," with respect to an individual, means:

- (A) the spouse of the individual;
- (B) a brother, brother-in-law, sister, or sister-in-law of the individual;
- (C) an ancestor or lineal descendant of the individual or the individual's spouse; or
- (D) any other relative, by blood or marriage, of the individual or the individual's spouse who shares the same home with the individual.

(63) "Person related to," with respect to an organization, means:

- (A) a person directly or indirectly controlling, controlled by, or under common control with the organization;
- (B) an officer or director of, or a person performing similar functions with respect to, the organization;
- (C) an officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A) of this paragraph;
- (D) the spouse of an individual described in subparagraph (A), (B) or (C) of this paragraph; or
- (E) an individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C) or (D) of this paragraph and shares the same home with the individual.

(64) "Proceeds" means the following property:

- (A) whatever is acquired upon the sale, lease, license, exchange or other disposition of collateral;
- (B) whatever is collected on, or distributed on account of, collateral;
- (C) rights arising out of collateral;
- (D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or
- (E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(66) "Proposal" means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept

collateral in full or partial satisfaction of the obligation it secures pursuant to sections 28-9-620, 28-9-621 and 28-9-622, Idaho Code.

(67) "Public-finance transaction" means a secured transaction in connection with which:

(A) debt securities are issued;

(B) all or a portion of the securities issued have an initial stated maturity of at least twenty (20) years; and

(C) the debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a state or a governmental unit of a state.

(68) "Public organic record" means a record that is available to the public for inspection and that is:

(A) a record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization and any record filed with or issued by the state or the United States which amends or restates the initial record;

(B) an organic record of a business trust consisting of the record initially filed with a state and any record filed with the state which amends or restates the initial record, if a statute of the state governing business trusts requires that the record be filed with the state; or

(C) a record consisting of legislation enacted by the legislature of a state or the congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the state or United States which amends or restates the name of the organization.

(69) "Pursuant to commitment," with respect to an advance made or other value given by a secured party, means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.

(70) "Record," except as used in "for record," "of record," "record or legal title," and "record owner," means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(71) "Registered organization" means an organization formed or organized solely under the law of a single state or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the state or United States. The term includes a business trust that is formed or organized under the law of a single state if a statute of the state governing business trusts requires that the business trust's organic record be filed with the state.

(72) "Secondary obligor" means an obligor to the extent that:

(A) the obligor's obligation is secondary; or

(B) the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

(73) "Secured party" means:

- (A) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;
 - (B) a person that holds an agricultural lien;
 - (C) a consignor;
 - (D) a person to which accounts, chattel paper, payment intangibles or promissory notes have been sold;
 - (E) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or
 - (F) a person that holds a security interest arising under section 28-2-401, 28-2-505, 28-2-711(3), 28-4-210, 28-5-120 or 28-12-508(5), Idaho Code.
- (74) "Security agreement" means an agreement that creates or provides for a security interest.
- (75) "Send," in connection with a record or notification, means:
- (A) to deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or
 - (B) to cause the record or notification to be received within the time that it would have been received if properly sent under subparagraph (A) of this paragraph.
- (76) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.
- (77) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
- (78) "Supporting obligation" means a letter of credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument or investment property.
- (79) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.
- (80) "Termination statement" means an amendment of a financing statement which:
- (A) identifies, by its file number, the initial financing statement to which it relates; and
 - (B) indicates either that it is a termination statement or that the identified financing statement is no longer effective.
- (81) "Transmitting utility" means a person primarily engaged in the business of:
- (A) operating a railroad, subway, street railway, or trolley bus;
 - (B) transmitting communications electrically, electromagnetically or by light;

(C) transmitting goods by pipeline or sewer; or

(D) transmitting or producing and transmitting electricity, steam, gas or water.

(b) "Control" as provided in section 28-7-106, Idaho Code, and the following definitions in other chapters apply to this chapter:

| | |
|---|--------------------------------|
| "Applicant" | section 28-5-102, Idaho Code. |
| "Beneficiary" | section 28-5-102, Idaho Code. |
| "Broker" | section 28-8-102, Idaho Code. |
| "Certificated security" | section 28-8-102, Idaho Code. |
| "Check" | section 28-3-104, Idaho Code. |
| "Clearing corporation" | section 28-8-102, Idaho Code. |
| "Contract for sale" | section 28-2-106, Idaho Code. |
| "Customer" | section 28-4-104, Idaho Code. |
| "Entitlement holder" | section 28-8-102, Idaho Code. |
| "Financial asset" | section 28-8-102, Idaho Code. |
| "Holder in due course" | section 28-3-302, Idaho Code. |
| "Issuer" (with respect to a letter of credit or letter of credit right) | section 28-5-102, Idaho Code. |
| "Issuer" (with respect to a security) | section 28-8-201, Idaho Code. |
| "Issuer" (with respect to documents of title) | section 28-7-102, Idaho Code. |
| "Lease" | section 28-12-103, Idaho Code. |
| "Lease agreement" | section 28-12-103, Idaho Code. |
| "Lease contract" | section 28-12-103, Idaho Code. |
| "Leasehold interest" | section 28-12-103, Idaho Code. |
| "Lessee" | section 28-12-103, Idaho Code. |
| "Lessee in ordinary course of business" | section 28-12-103, Idaho Code. |
| "Lessor" | section 28-12-103, Idaho Code. |
| "Lessor's residual interest" | section 28-12-103, Idaho Code. |
| "Letter of credit" | section 28-5-102, Idaho Code. |
| "Merchant" | section 28-2-104, Idaho Code. |
| "Negotiable instrument" | section 28-3-104, Idaho Code. |
| "Nominated person" | section 28-5-102, Idaho Code. |
| "Note" | section 28-3-104, Idaho Code. |
| "Proceeds of a letter of credit" | section 28-5-114, Idaho Code. |
| "Prove" | section 28-3-103, Idaho Code. |
| "Sale" | section 28-2-106, Idaho Code. |
| "Securities account" | section 28-8-501, Idaho Code. |
| "Securities intermediary" | section 28-8-102, Idaho Code. |
| "Security" | section 28-8-102, Idaho Code. |
| "Security certificate" | section 28-8-102, Idaho Code. |
| "Security entitlement" | section 28-8-102, Idaho Code. |
| "Uncertificated security" | section 28-8-102, Idaho Code. |

(c) Chapter 1, title 28[, Idaho Code], contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History.

I.C., § 28-9-102, as added by 2001, ch. 208, § 2, p. 704; am. 2002, ch. 107, § 1, p. 290; am.

2004, ch. 42, § 21, p. 77; am. 2012, ch. 145, § 1, p. 381.

STATUTORY NOTES**Prior Laws.**

Former section 28-9-102 which comprised 1967, ch. 161, § 9-102, p. 351; am. 1979, ch. 299, § 4, p. 781. was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2012 amendment, by ch. 145, rewrote paragraph (a)(7)(B) which formerly read: “to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record”; added the second sentence in paragraph (a)(10); added paragraph (a)(68), redesignating the subsequent paragraphs accordingly; and, in paragraph (a)(71), inserted “formed or” near the beginning, substituted “by the filing of a public

organic record with, the issuance of a public organic record by, or the enactment of legislation by the state or United States” for “and as to which the state or the United States must maintain a public record showing the organization to have been organized”, and added the last sentence.

Compiler’s Notes.

The bracketed insertion in subsection (c) was added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS**ANALYSIS**

Commercial torts.
Proceeds.
Writing required.

Commercial Torts.

Where the debtors’ complaint against an electrical company that alleged breach of contract and warranty, negligence, fraud, and consumer protection violations made apportionment among the claims impossible, and since the suit was primarily premised on a contract for services, despite the lack of a written contract, the action was not a commercial tort claim; the action was a general intangible, or a “thing in action” and was subject to the first creditor’s security agreement. In re Wiersma, 283 Bankr. 294 (Bankr. D. Idaho 2002), aff’d in part, 324 Bankr. 92 (B.A.P. 9th Cir. 2005).

Proceeds.

Attorney’s security interest in a promissory note automatically attached to any proceeds of the note, including any rights arising out of the note. The security agreement did not limit the types of proceeds to which the attorney’s security interest would attach because the

attorney identified specific proceeds in the security agreement, and a party who seeks to limit the type of statutory proceeds to which its security interest attaches must state an intent to limit proceeds in the security agreement. Karle v. Visser, 141 Idaho 804, 118 P.3d 136 (2005).

Writing Required.

In Chapter 7 proceedings, since there was no written loan agreement between the debtor and her creditor father, there was no perfected security interest which could be avoided by the bankruptcy trustee, and, thus, debtor was entitled to a \$3800 exemption from proceeds of the sale of her vehicle. In re Seibold, 351 B.R. 741 (Bankr. D. Idaho 2006).

Cited in: Wood v. Pillsbury Co., 38 Bankr. 375 (Bankr. D. Idaho 1983); J.K. Merrill & Son v. Carter, 108 Idaho 749, 702 P.2d 787 (1985); Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc. (In re Walter B. Scott & Sons, Inc.), 436 B.R. 582 (Bankr. D. Idaho 2010).

DECISIONS UNDER PRIOR LAW**ANALYSIS**

Account debtor.
Object of trust receipts act.

Property subject to mortgage.
Security agreement.
Security interest.

Account Debtor.

An obligor's legal status as an "account debtor" comes into being only when the assigned "contract rights" are collateral, subject to a security interest. The code extends no protection to an assignee if a security interest has not attached to the assigned contract rights. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

Object of Trust Receipts Act.

The object of the former Uniform Trust Receipts Act was to standardize and protect the trust receipts method of financing the acquisition and resale of goods in their journey from producer to retailer. *Commercial Credit Corp. v. Bosse*, 76 Idaho 409, 283 P.2d 937 (1955).

Property Subject to Mortgage.

Valid chattel mortgage could not be given on property other than that described in statute, and attempted chattel mortgage on building affixed to land created no lien thereon. *Beeler v. C.C. Mercantile Co.*, 8 Idaho 644, 70 P. 943 (1902).

State liquor license, being a qualified defeasible property right, was subject to encumbrance as a chattel mortgage. *Schieche v. Pasco*, 88 Idaho 36, 395 P.2d 671 (1964).

When chattel mortgage embraced the business, fixtures, good will, inventory and lease on a bar, as between mortgagor and mortgagee, it included the retail liquor license. *Schieche v. Pasco*, 88 Idaho 36, 395 P.2d 671 (1964).

Security Agreement.

Neither the UCC-1F financing statement nor the UCC-3F amendment is a form which "creates or provides for a security interest," and, therefore, neither meets the definition of a "security agreement." *Kelley Bean Co. v.*

Victor, 122 Idaho 395, 834 P.2d 912 (Ct. App. 1992).

Security Interest.

Where the evidence was clear that although a lease agreement did contain some attributes of an installment sales contract, there was no oral or written option to purchase the equipment, and title did not pass to the lessee at the end of the term, and since no other relevant evidence was presented demonstrating that the parties intended the transaction to be anything other than a lease, the trial court properly held that the lease agreement was not a security interest subject to Article 9 of the UCC. *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982).

Agreements between the owner of a truck and a trailer and a lessee constituted true leases rather than security agreements in a sales transaction where the agreements expressly stated that the lessee was given no option to purchase and that lessee had no claim of ownership or any right or interest in the property other than as a lessee. Although other language in the agreement gave lessee an opportunity to purchase the property, this opportunity was restricted, and there was no evidence that lessee would have acquired any equity or interest in the property during the term of the lease as a result of that language. *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989).

A security interest was created by two promissory notes, each containing the words "SECURITY: 1956 GMC bus," and by a certificate of title endorsed and delivered to defendant; the promissory notes and the certificate of title served to satisfy the requirement of displaying both a loan and the taking of security for the payment thereof. *Simplot v. Owens*, 119 Idaho 243, 805 P.2d 449 (1990).

RESEARCH REFERENCES

A.L.R. — What constitutes inventory under UCC § 9-109 (4). 77 A.L.R.3d 1266.

Consignment transactions under Uniform

Commercial Code Article 9 on Secured Transactions. 58 A.L.R.6th 289.

OFFICIAL COMMENT

1. **Source.** All terms that are defined in Article 9 and used in more than one section are consolidated in this section. Note that the definition of "security interest" is found in Section 1-201, not in this Article, and has been revised. See Appendix I. Many of the definitions in this section are new; many

others derive from those in former Section 9-105. The following Comments also indicate other sections of former Article 9 that defined (or explained) terms.

2. Parties to Secured Transactions.

a. **"Debtor"; "Obligor"; "Secondary Obligor."** Determining whether a person was a

“debtor” under former Section 9-105(1)(d) required a close examination of the context in which the term was used. To reduce the need for this examination, this Article redefines “debtor” and adds new defined terms, “secondary obligor” and “obligor.” In the context of Part 6 (default and enforcement), these definitions distinguish among three classes of persons: (i) those persons who may have a stake in the proper enforcement of a security interest by virtue of their non-lien property interest (typically, an ownership interest) in the collateral, (ii) those persons who may have a stake in the proper enforcement of the security interest because of their obligation to pay the secured debt, and (iii) those persons who have an obligation to pay the secured debt but have no stake in the proper enforcement of the security interest. Persons in the first class are debtors. Persons in the second class are secondary obligors if any portion of the obligation is secondary or if the obligor has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. One must consult the law of suretyship to determine whether an obligation is secondary. The Restatement (3d), Suretyship and Guaranty § 1 (1996), contains a useful explanation of the concept. Obligors in the third class are neither debtors nor secondary obligors. With one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties provided by Part 6 affect non-debtor obligors only if they are “secondary obligors.”

By including in the definition of “debtor” all persons with a property interest (other than a security interest in or other lien on collateral), the definition includes transferees of collateral, whether or not the secured party knows of the transfer or the transferee’s identity. Exculpatory provisions in Part 6 protect the secured party in that circumstance. See Sections 9-605 and 9-628. The definition renders unnecessary former Section 9-112, which governed situations in which collateral was not owned by the debtor. The definition also includes a “consignee,” as defined in this section, as well as a seller of accounts, chattel paper, payment intangibles, or promissory notes.

Secured parties and other lienholders are excluded from the definition of “debtor” because the interests of those parties normally derive from and encumber a debtor’s interest. However, if in a *separate* secured transaction a secured party grants, *as debtor*, a security interest in its own interest (i.e., its security interest and any obligation that it secures), the secured party is a debtor *in that transaction*. This typically occurs when a secured party with a security interest in specific goods assigns chattel paper.

Consider the following examples:

Example 1: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Behnfeldt is a debtor and an obligor.

Example 2: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Bruno co-signs a negotiable note as maker. As before, Behnfeldt is the debtor and an obligor. As an accommodation party (see Section 3-419), Bruno is a secondary obligor. Bruno has this status even if the note states that her obligation is a primary obligation and that she waives all suretyship defenses.

Example 3: Behnfeldt borrows money on an unsecured basis. Bruno co-signs the note and grants a security interest in her Honda to secure her obligation. Inasmuch as Behnfeldt does not have a property interest in the Honda, Behnfeldt is not a debtor. Having granted the security interest, Bruno is the debtor. Because Behnfeldt is a principal obligor, she is not a secondary obligor. Whatever the outcome of enforcement of the security interest against the Honda or Bruno’s secondary obligation, Bruno will look to Behnfeldt for her losses. The enforcement will not affect Behnfeldt’s aggregate obligations.

When the principal obligor (borrower) and the secondary obligor (surety) each has granted a security interest in different collateral, the status of each is determined by the collateral involved.

Example 4: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Bruno co-signs the note and grants a security interest in her Honda to secure her obligation. When the secured party enforces the security interest in Behnfeldt’s Miata, Behnfeldt is the debtor, and Bruno is a secondary obligor. When the secured party enforces the security interest in the Honda, Bruno is the “debtor.” As in Example 3, Behnfeldt is an obligor, but not a secondary obligor.

b. **“Secured Party.”** The secured party is the person in whose favor the security interest has been created, as determined by reference to the security agreement. This definition controls, among other things, which person has the duties and potential liability that Part 6 imposes upon a secured party. The definition of “secured party” also includes a “consignor,” a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold, and the holder of an agricultural lien.

The definition of “secured party” clarifies the status of various types of representatives. Consider, for example, a multi-bank facility under which Bank A, Bank B, and Bank C are lenders and Bank A serves as the collateral agent. If the security interest is granted to the banks, then they are the secured parties. If

the security interest is granted to Bank A as collateral agent, then Bank A is the secured party.

c. **Other Parties.** A “consumer obligor” is defined as the obligor in a consumer transaction. Definitions of “new debtor” and “original debtor” are used in the special rules found in Sections 9-326 and 9-508.

3. Definitions Relating to Creation of a Security Interest.

a. **“Collateral.”** As under former Section 9-105, “collateral” is the property subject to a security interest and includes accounts and chattel paper that have been sold. It has been expanded in this Article. The term now explicitly includes proceeds subject to a security interest. It also reflects the broadened scope of the Article. It includes property subject to an agricultural lien as well as payment intangibles and promissory notes that have been sold.

b. **“Security Agreement.”** The definition of “security agreement” is substantially the same as under former Section 9-105—an agreement that creates or provides for a security interest. However, the term frequently was used colloquially in former Article 9 to refer to the document or writing that contained a debtor’s security agreement. This Article eliminates that usage, reserving the term for the more precise meaning specified in the definition.

Whether an agreement creates a security interest depends not on whether the parties intend that the law *characterize* the transaction as a security interest but rather on whether the transaction falls within the definition of “security interest” in Section 1-201. Thus, an agreement that the parties characterize as a “lease” of goods may be a “security agreement,” notwithstanding the parties’ stated intention that the law treat the transaction as a lease and not as a secured transaction. See Section 1-203.

4. Goods-Related Definitions.

a. **“Goods”; “Consumer Goods”; “Equipment”; “Farm Products”; “Farming Operation”; “Inventory.”** The definition of “goods” is substantially the same as the definition in former Section 9-105. This Article also retains the four mutually-exclusive “types” of collateral that consist of goods: “consumer goods,” “equipment,” “farm products,” and “inventory.” The revisions are primarily for clarification.

The classes of goods are mutually exclusive. For example, the same property cannot simultaneously be both equipment and inventory. In borderline cases — a physician’s car or a farmer’s truck that might be either consumer goods or equipment — the principal use to which the property is put is determinative. Goods can fall into different classes at different times. For example, a radio may be inven-

tory in the hands of a dealer and consumer goods in the hands of a consumer. As under former Article 9, goods are “equipment” if they do not fall into another category.

The definition of “consumer goods” follows former Section 9-109. The classification turns on whether the debtor uses or bought the goods for use “primarily for personal, family, or household purposes.”

Goods are inventory if they are leased by a lessor or held by a person for sale or lease. The revised definition of “inventory” makes clear that the term includes goods leased by the debtor to others as well as goods held for lease. (The same result should have obtained under the former definition.) Goods to be furnished or furnished under a service contract, raw materials, and work in process also are inventory. Implicit in the definition is the criterion that the sales or leases are or will be in the ordinary course of business. For example, machinery used in manufacturing is equipment, not inventory, even though it is the policy of the debtor to sell machinery when it becomes obsolete or worn. Inventory also includes goods that are consumed in a business (e.g., fuel used in operations). In general, goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively long period of use, but are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service.

Goods are “farm products” if the debtor is engaged in farming operations with respect to the goods. Animals in a herd of livestock are covered whether the debtor acquires them by purchase or as a result of natural increase. Products of crops or livestock remain farm products as long as they have not been subjected to a manufacturing process. The terms “crops” and “livestock” are not defined. The new definition of “farming operations” is for clarification only.

Crops, livestock, and their products cease to be “farm products” when the debtor ceases to be engaged in farming operations with respect to them. If, for example, they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory. Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not specified in this Article. At one end of the spectrum, some processes are so closely connected with farming — such as pasteurizing milk or boiling sap to produce maple syrup or sugar — that they would not constitute manufacturing. On the other hand an extensive canning

operation would be manufacturing. Once farm products have been subjected to a manufacturing operation, they normally become inventory.

The revised definition of "farm products" clarifies the distinction between crops and standing timber and makes clear that aquatic goods produced in aquacultural operations may be either crops or livestock. Although aquatic goods that are vegetable in nature often would be crops and those that are animal would be livestock, this Article leaves the courts free to classify the goods on a case-by-case basis. See Section 9-324, Comment 11.

The definitions of "goods" and "software" are also mutually exclusive. Computer programs usually constitute "software," and, as such, are not "goods" as this Article uses the terms. However, under the circumstances specified in the definition of "goods," computer programs embedded in goods are part of the "goods" and are not "software."

b. **"Accession"; "Manufactured Home"; "Manufactured-Home Transaction."** Other specialized definitions of goods include "accession" (see the special priority and enforcement rules in Section 9-335), and "manufactured home" (see Section 9-515, permitting a financing statement in a "manufactured-home transaction" to be effective for 30 years). The definition of "manufactured home" borrows from the federal Manufactured Housing Act, 42 U.S.C. § 5401 *et seq.*, and is intended to have the same meaning.

c. **"As-Extracted Collateral."** Under this Article, oil, gas, and other minerals that have not been extracted from the ground are treated as real property, to which this Article does not apply. Upon extraction, minerals become personal property (goods) and eligible to be collateral under this Article. See the definition of "goods," which excludes "oil, gas, and other minerals before extraction." To take account of financing practices reflecting the shift from real to personal property, this Article contains special rules for perfecting security interests in minerals which attach upon extraction and in accounts resulting from the sale of minerals at the wellhead or minehead. See, e.g., Sections 9-301(4) (law governing perfection and priority); 9-501 (place of filing), 9-502 (contents of financing statement), 9-519 (indexing of records). The new term, "as-extracted collateral," refers to the minerals and related accounts to which the special rules apply. The term "at the wellhead" encompasses arrangements based on a sale of the produce at the moment that it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" of a well, the far side of a gathering tank, or at some other point. The term "at . . . the minehead" is comparable.

The following examples explain the operation of these provisions.

Example 5: Debtor owns an interest in oil that is to be extracted. To secure Debtor's obligations to Lender, Debtor enters into an authenticated agreement granting Lender an interest in the oil. Although Lender may acquire an interest in the oil under real-property law, Lender does not acquire a security interest under this Article until the oil becomes personal property, i.e., until is extracted and becomes "goods" to which this Article applies. Because Debtor had an interest in the oil before extraction and Lender's security interest attached to the oil as extracted, the oil is "as-extracted collateral."

Example 6: Debtor owns an interest in oil that is to be extracted and contracts to sell the oil to Buyer at the wellhead. In an authenticated agreement, Debtor agrees to sell to Lender the right to payment from Buyer. This right to payment is an account that constitutes "as-extracted collateral." If Lender then resells the account to Financer, Financer acquires a security interest. However, inasmuch as the debtor-seller in that transaction, Lender, had no interest in the oil before extraction, Financer's collateral (the account it owns) is not "as-extracted collateral."

Example 7: Under the facts of Example 6, before extraction, Buyer grants a security interest in the oil to Bank. Although Bank's security interest attaches when the oil is extracted, Bank's security interest is not in "as-extracted collateral," inasmuch as its debtor, Buyer, did not have an interest in the oil before extraction.

5. Receivables-related Definitions.

a. **"Account"; "Health-Care-Insurance Receivable"; "As-Extracted Collateral."** The definition of "account" has been expanded and reformulated. It is no longer limited to rights to payment relating to goods or services. Many categories of rights to payment that were classified as general intangibles under former Article 9 are accounts under this Article. Thus, if they are sold, a financing statement must be filed to perfect the buyer's interest in them. As used in the definition of "account," a right to payment "arising out of the use of a credit or charge card or information contained on or for use with the card" is the right of a card issuer to payment from its cardholder. A credit-card or charge-card transaction may give rise to other rights to payments; however, those other rights do not "arise out of the use" of the card or information contained on or for use with the card. Among the types of property that are expressly excluded from the definition of account is "a right to payment for money or funds advanced or sold." As defined in Section 1-201, "money" is limited essentially to currency. As used in the exclusion from the

definition of “account,” however, “funds” is a broader concept (although the term is not defined). For example, when a bank-lender credits a borrower’s deposit account for the amount of a loan, the bank’s advance of funds is not a transaction giving rise to an account.

The definition of “health-care-insurance receivable” is new. It is a subset of the definition of “account.” However, the rules generally applicable to account debtors on accounts do not apply to insurers obligated on health-care-insurance receivables. See Sections 9-404(e), 9-405(d), 9-406(i).

Note that certain accounts also are “as-extracted collateral.” See Comment 4.c., Examples 6 and 7.

b. **“Chattel Paper”; “Electronic Chattel Paper”; “Tangible Chattel Paper.”** “Chattel paper” consists of a monetary obligation together with a security interest in or a lease of specific goods if the obligation and security interest or lease are evidenced by “a record or records.” The definition has been expanded from that found in former Article 9 to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, or a lease of specific goods and license of software used in the goods. The expanded definition covers transactions in which the debtor’s or lessee’s monetary obligation includes amounts owed with respect to software used in the goods. The monetary obligation with respect to the software need not be owed under a license from the secured party or lessor, and the secured party or lessor need not be a party to the license transaction itself. Among the types of monetary obligations that are included in “chattel paper” are amounts that have been advanced by the secured party or lessor to enable the debtor or lessee to acquire or obtain financing for a license of the software used in the goods. The definition also makes clear that rights to payment arising out of credit-card transactions are not chattel paper.

Charters of vessels are expressly excluded from the definition of chattel paper; they are accounts. The term “charter” as used in this section includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage, and all other arrangements for the use of vessels.

Under former Section 9-105, only if the evidence of an obligation consisted of “a writing or writings” could an obligation qualify as chattel paper. In this Article, traditional, written chattel paper is included in the definition of “tangible chattel paper.” “Electronic chattel paper” is chattel paper that is stored in an electronic medium instead of in tangible form. The concept of an electronic medium should be construed liberally to include elec-

trical, digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies.

c. **“Instrument”; “Promissory Note.”** The definition of “instrument” includes a negotiable instrument. As under former Section 9-105, it also includes any other right to payment of a monetary obligation that is evidenced by a writing of a type that in ordinary course of business is transferred by delivery (and, if necessary, an indorsement or assignment). Except in the case of chattel paper, the fact that an instrument is secured by a security interest or encumbrance on property does not change the character of the instrument as such or convert the combination of the instrument and collateral into a separate classification of personal property. The definition makes clear that rights to payment arising out of credit-card transactions are not instruments. The definition of “promissory note” is new, necessitated by the inclusion of sales of promissory notes within the scope of Article 9. It explicitly excludes obligations arising out of “orders” to pay (e.g., checks) as opposed to “promises” to pay. See Section 3-104.

d. **“General Intangible”; “Payment Intangible.”** “General intangible” is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument. As used in the definition of “general intangible,” “things in action” includes rights that arise under a license of intellectual property, including the right to exploit the intellectual property without liability for infringement. The definition has been revised to exclude commercial tort claims, deposit accounts, and letter-of-credit rights. Each of the three is a separate type of collateral. One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated on letters of credit (letter-of-credit rights) are not “account debtors” having the rights and obligations set forth in Sections 9-404, 9-405, and 9-406. In particular, tortfeasors, banks, and persons obligated on letters of credit are not obligated to pay an assignee (secured party) upon receipt of the notification described in Section 9-404(a). See Comment 5.h. Another important consequence relates to the adequacy of the description in the security agreement. See Section 9-108.

“Payment intangible” is a subset of the definition of “general intangible.” The sale of a payment intangible is subject to this Article. See Section 9-109(a)(3). Virtually any intangible right could give rise to a right to pay-

ment of money once one hypothesizes, for example, that the account debtor is in breach of its obligation. The term “payment intangible,” however, embraces only those general intangibles “under which the account debtor’s principal obligation is a monetary obligation.” (Emphasis added.) A debtor’s right to payment from another person of amounts received by the other person on the debtor’s behalf, including the right of a merchant in a credit-card, debit-card, prepaid-card, or other payment-card transaction to payment of amounts received by its bank from the card system in settlement of the transaction, is a “payment intangible.” (In contrast, the right of a credit-card issuer to payment arising out of the use of a credit card is an “account.”)

In classifying intangible collateral, a court should begin by identifying the particular rights that have been assigned. The account debtor (promisor) under a particular contract may owe several types of monetary obligations as well as other, nonmonetary obligations. If the promisee’s right to payment of money is assigned separately, the right is an account or payment intangible, depending on how the account debtor’s obligation arose. When all the promisee’s rights are assigned together, an account, a payment intangible, and a general intangible all may be involved, depending on the nature of the rights.

A right to the payment of money is frequently buttressed by ancillary rights, such as rights arising from covenants in a purchase agreement, note, or mortgage requiring insurance on the collateral or forbidding removal of the collateral, rights arising from covenants to preserve the creditworthiness of the promisor, and the lessor’s rights with respect to leased goods that arise upon the lessee’s default (see Section 2A-523). This Article does not treat these ancillary rights separately from the rights to payment to which they relate. For example, attachment and perfection of an assignment of a right to payment of a monetary obligation, whether it be an account or payment intangible, also carries these ancillary rights. Thus, an assignment of the lessor’s right to payment under a lease also transfers the lessor’s rights with respect to the leased goods under Section 2A-523. If, taken together, the lessor’s rights to payment and with respect to the leased goods are evidenced by chattel paper, then, contrary to *In re Commercial Money Center, Inc.*, 350 B.R. 465 (Bankr. App. 9th Cir. 2006), an assignment of the lessor’s right to payment constitutes an assignment of the chattel paper. Although an agreement excluding the lessor’s rights with respect to the leased goods from an assignment of the lessor’s right to payment may be effective between the parties, the agreement does not affect the characterization of the collateral to the prejudice

of creditors of, and purchasers from, the assignor.

Every “payment intangible” is also a “general intangible.” Likewise, “software” is a “general intangible” for purposes of this Article. See Comment 25. Accordingly, except as otherwise provided, statutory provisions applicable to general intangibles apply to payment intangibles and software.

e. **“Letter-of-Credit Right.”** The term “letter-of-credit right” embraces the rights to payment and performance under a letter of credit (defined in Section 5-102). However, it does not include a beneficiary’s right to demand payment or performance. Transfer of those rights to a transferee beneficiary is governed by Article 5. See Sections 9-107, Comment 4, and 9-329, Comments 3 and 4.

f. **“Supporting Obligation.”** This new term covers the most common types of credit enhancements-suretyship obligations (including guarantees) and letter-of-credit rights that support one of the types of collateral specified in the definition. As explained in Comment 2.a., suretyship law determines whether an obligation is “secondary” for purposes of this definition. Section 9-109 generally excludes from this Article transfers of interests in insurance policies. However, the regulation of a secondary obligation as an insurance product does not necessarily mean that it is a “policy of insurance” for purposes of the exclusion in Section 9-109. Thus, this Article may cover a secondary obligation (as a supporting obligation), even if the obligation is issued by a regulated insurance company and the obligation is subject to regulation as an “insurance” product.

This Article contains rules explicitly governing attachment, perfection, and priority of security interests in supporting obligations. See Sections 9-203, 9-308, 9-310, and 9-322. These provisions reflect the principle that a supporting obligation is an incident of the collateral it supports.

Collections of or other distributions under a supporting obligation are “proceeds” of the supported collateral as well as “proceeds” of the supporting obligation itself. See Section 9-102 (defining “proceeds”) and Comment 13.b. As such, the collections and distributions are subject to the priority rules applicable to proceeds generally. See Section 9-322. However, under the special rule governing security interests in a letter-of-credit right, a secured party’s failure to obtain control (Section 9-107) of a letter-of-credit right supporting collateral may leave its security interest exposed to a priming interest of a party who does take control. See Section 9-329 (security interest in a letter-of-credit right perfected by control has priority over a conflicting security interest).

g. **“Commercial Tort Claim.”** This term is new. A tort claim may serve as original collateral under this Article only if it is a “commercial tort claim.” See Section 9-109(d). Although security interests in commercial tort claims are within its scope, this Article does not override other applicable law restricting the assignability of a tort claim. See Section 9-401. A security interest in a tort claim also may exist under this Article if the claim is proceeds of other collateral.

h. **“Account Debtor.”** An “account debtor” is a person obligated on an account, chattel paper, or general intangible. The account debtor’s obligation often is a monetary obligation; however, this is not always the case. For example, if a franchisee uses its rights under a franchise agreement (a general intangible) as collateral, then the franchisor is an “account debtor.” As a general matter, Article 3, and not Article 9, governs obligations on negotiable instruments. Accordingly, the definition of “account debtor” excludes obligors on negotiable instruments constituting part of chattel paper. The principal effect of this change from the definition in former Article 9 is that the rules in Sections 9-403, 9-404, 9-405, and 9-406, dealing with the rights of an assignee and duties of an account debtor, do not apply to an assignment of chattel paper in which the obligation to pay is evidenced by a negotiable instrument. (Section 9-406(d), however, does apply to promissory notes, including negotiable promissory notes.) Rather, the assignee’s rights are governed by Article 3. Similarly, the duties of an obligor on a nonnegotiable instrument are governed by non-Article 9 law unless the nonnegotiable instrument is a part of chattel paper, in which case the obligor is an account debtor.

i. **Receivables Under Government Entitlement Programs.** This Article does not contain a defined term that encompasses specifically rights to payment or performance under the many and varied government entitlement programs. Depending on the nature of a right under a program, it could be an account, a payment intangible, a general intangible other than a payment intangible, or another type of collateral. The right also might be proceeds of collateral (e.g., crops).

6. **Investment-Property-Related Definitions: “Commodity Account”; “Commodity Contract”; “Commodity Customer”; “Commodity Intermediary”; “Investment Property.”** These definitions are substantially the same as the corresponding definitions in former Section 9-115. “Investment property” includes securities, both certificated and uncertificated, securities accounts, security entitlements, commodity accounts, and commodity contracts. The term investment property includes a “securities account” in order to facilitate transactions in

which a debtor wishes to create a security interest in all of the investment positions held through a particular account rather than in particular positions carried in the account. Former Section 9-115 was added in conjunction with Revised Article 8 and contained a variety of rules applicable to security interests in investment property. These rules have been relocated to the appropriate sections of Article 9. See, e.g., Sections 9-203 (attachment), 9-314 (perfection by control), 9-328 (priority).

The terms “security,” “security entitlement,” and related terms are defined in Section 8-102, and the term “securities account” is defined in Section 8-501. The terms “commodity account,” “commodity contract,” “commodity customer,” and “commodity intermediary” are defined in this section. Commodity contracts are not “securities” or “financial assets” under Article 8. See Section 8-103(f). Thus, the relationship between commodity intermediaries and commodity customers is not governed by the indirect-holding-system rules of Part 5 of Article 8. For securities, Article 9 contains rules on security interests, and Article 8 contains rules on the rights of transferees, including secured parties, on such matters as the rights of a transferee if the transfer was itself wrongful and gives rise to an adverse claim. For commodity contracts, Article 9 establishes rules on security interests, but questions of the sort dealt with in Article 8 for securities are left to other law.

The indirect-holding-system rules of Article 8 are sufficiently flexible to be applied to new developments in the securities and financial markets, where that is appropriate. Accordingly, the definition of “commodity contract” is narrowly drafted to ensure that it does not operate as an obstacle to the application of the Article 8 indirect-holding-system rules to new products. The term “commodity contract” covers those contracts that are traded on or subject to the rules of a designated contract market and foreign commodity contracts that are carried on the books of American commodity intermediaries. The effect of this definition is that the category of commodity contracts that are excluded from Article 8 but governed by Article 9 is essentially the same as the category of contracts that fall within the exclusive regulatory jurisdiction of the federal Commodity Futures Trading Commission.

Commodity contracts are different from securities or other financial assets. A person who enters into a commodity futures contract is not buying an asset having a certain value and holding it in anticipation of increase in value. Rather the person is entering into a contract to buy or sell a commodity at set price for delivery at a future time. That contract may become advantageous or disadvantageous as the price of the commodity fluctuates.

ates during the term of the contract. The rules of the commodity exchanges require that the contracts be marked to market on a daily basis; that is, the customer pays or receives any increment attributable to that day's price change. Because commodity customers may incur obligations on their contracts, they are required to provide collateral at the outset, known as "original margin," and may be required to provide additional amounts, known as "variation margin," during the term of the contract.

The most likely setting in which a person would want to take a security interest in a commodity contract is where a lender who is advancing funds to finance an inventory of a physical commodity requires the borrower to enter into a commodity contract as a hedge against the risk of decline in the value of the commodity. The lender will want to take a security interest in both the commodity itself and the hedging commodity contract. Typically, such arrangements are structured as security interests in the entire commodity account in which the borrower carries the hedging contracts, rather than in individual contracts.

One important effect of including commodity contracts and commodity accounts in Article 9 is to provide a clearer legal structure for the analysis of the rights of commodity clearing organizations against their participants and futures commission merchants against their customers. The rules and agreements of commodity clearing organizations generally provide that the clearing organization has the right to liquidate any participant's positions in order to satisfy obligations of the participant to the clearing corporation. Similarly, agreements between futures commission merchants and their customers generally provide that the futures commission merchant has the right to liquidate a customer's positions in order to satisfy obligations of the customer to the futures commission merchant.

The main property that a commodity intermediary holds as collateral for the obligations that the commodity customer may incur under its commodity contracts is not other commodity contracts carried by the customer but the other property that the customer has posted as margin. Typically, this property will be securities. The commodity intermediary's security interest in such securities is governed by the rules of this Article on security interests in securities, not the rules on security interests in commodity contracts or commodity accounts.

Although there are significant analytic and regulatory differences between commodities and securities, the development of commodity contracts on financial products in the past few decades has resulted in a system in which the commodity markets and securities markets

are closely linked. The rules on security interests in commodity contracts and commodity accounts provide a structure that may be essential in times of stress in the financial markets. Suppose, for example that a firm has a position in a securities market that is hedged by a position in a commodity market, so that payments that the firm is obligated to make with respect to the securities position will be covered by the receipt of funds from the commodity position. Depending upon the settlement cycles of the different markets, it is possible that the firm could find itself in a position where it is obligated to make the payment with respect to the securities position before it receives the matching funds from the commodity position. If cross-margining arrangements have not been developed between the two markets, the firm may need to borrow funds temporarily to make the earlier payment. The rules on security interests in investment property would facilitate the use of positions in one market as collateral for loans needed to cover obligations in the other market.

7. Consumer-Related Definitions:
"Consumer Debtor"; "Consumer Goods"; "Consumer-goods transaction"; "Consumer Obligor"; "Consumer Transaction." The definition of "consumer goods" (discussed above) is substantially the same as the definition in former Section 9-109. The definitions of "consumer debtor," "consumer obligor," "consumer-goods transaction," and "consumer transaction" have been added in connection with various new (and old) consumer-related provisions and to designate certain provisions that are inapplicable in consumer transactions.

"Consumer-goods transaction" is a subset of "consumer transaction." Under each definition, both the obligation secured and the collateral must have a personal, family, or household purpose. However, "mixed" business and personal transactions also may be characterized as a consumer-goods transaction or consumer transaction. Subparagraph (A) of the definition of consumer-goods transactions and clause (i) of the definition of consumer transaction are primary purposes tests. Under these tests, it is necessary to determine the primary purpose of the obligation or obligations secured. Subparagraph (B) and clause (iii) of these definitions are satisfied if any of the collateral is consumer goods, in the case of a consumer-goods transaction, or "is held or acquired primarily for personal, family, or household purposes," in the case of a consumer transaction. The fact that some of the obligations secured or some of the collateral for the obligation does not satisfy the tests (e.g., some of the collateral is acquired for a business purpose) does not prevent a

transaction from being a “consumer transaction” or “consumer-goods transaction.”

8. **Filing-Related Definitions:** “**Continuation Statement**”; “**File Number**”; “**Filing Office**”; “**Filing-office Rule**”; “**Financing Statement**”; “**Fixture Filing**”; “**Manufactured-Home Transaction**”; “**New Debtor**”; “**Original Debtor**”; “**Public-Finance Transaction**”; “**Termination Statement**”; “**Transmitting Utility**.” These definitions are used exclusively or primarily in the filing-related provisions in Part 5. Most are self-explanatory and are discussed in the Comments to Part 5. A financing statement filed in a manufactured-home transaction or a public-finance transaction may remain effective for 30 years instead of the 5 years applicable to other financing statements. See Section 9-515(b). The definitions relating to medium neutrality also are significant for the filing provisions. See Comment 9.

The definition of “transmitting utility” has been revised to embrace the business of transmitting communications generally to take account of new and future types of communications technology. The term designates a special class of debtors for whom separate filing rules are provided in Part 5, thereby obviating the many local fixture filings that would be necessary under the rules of Section 9-501 for a far-flung public-utility debtor. A transmitting utility will not necessarily be regulated by or operating as such in a jurisdiction where fixtures are located. For example, a utility might own transmission lines in a jurisdiction, although the utility generates no power and has no customers in the jurisdiction.

9. Definitions Relating to Medium Neutrality.

a. **“Record.”** In many, but not all, instances, the term “record” replaces the term “writing” and “written.” A “record” includes information that is in intangible form (e.g., electronically stored) as well as tangible form (e.g., written on paper). Given the rapid development and commercial adoption of modern communication and storage technologies, requirements that documents or communications be “written,” “in writing,” or otherwise in tangible form do not necessarily reflect or aid commercial practices.

A “record” need not be permanent or indestructible, but the term does not include any oral or other communication that is not stored or preserved by any means. The information must be stored on paper or in some other medium. Information that has not been retained other than through human memory does not qualify as a record. Examples of current technologies commercially used to communicate or store information include, but are not limited to, magnetic media, optical discs, digital voice messaging systems, elec-

tronic mail, audio tapes, and photographic media, as well as paper. “Record” is an inclusive term that includes all of these methods of storing or communicating information. Any “writing” is a record. A record may be authenticated. See Comment 9.b. A record may be created without the knowledge or intent of a particular person.

Like the terms “written” or “in writing,” the term “record” does not establish the purposes, permitted uses, or legal effect that a record may have under any particular provision of law. Whatever is filed in the Article 9 filing system, including financing statements, continuation statements, and termination statements, whether transmitted in tangible or intangible form, would fall within the definition. However, in some instances, statutes or filing-office rules may require that a paper record be filed. In such cases, even if this Article permits the filing of an electronic record, compliance with those statutes or rules is necessary. Similarly, a filer must comply with a statute or rule that requires a particular type of encoding or formatting for an electronic record.

This Article sometimes uses the terms “for record,” “of record,” “record or legal title,” and “record owner.” Some of these are terms traditionally used in real-property law. The definition of “record” in this Article now explicitly excepts these usages from the defined term. Also, this Article refers to a record that is filed or recorded in real-property recording systems to record a mortgage as a “record of a mortgage.” This usage recognizes that the defined term “mortgage” means an interest in real property; it does not mean the record that evidences, or is filed or recorded with respect to, the mortgage.

b. **“Authenticate”; “Communicate”; “Send.”** The terms “authenticate” and “authenticated” generally replace “sign” and “signed.” “Authenticated” replaces and broadens the definition of “signed,” in Section 1-201, to encompass authentication of all records, not just writings. (References to authentication of, e.g., an agreement, demand, or notification mean, of course, authentication of a record containing an agreement, demand, or notification.) The terms “communicate” and “send” also contemplate the possibility of communication by nonwritten media. These definitions include the act of transmitting both tangible and intangible records. The definition of “send” replaces, for purposes of this Article, the corresponding term in Section 1-201. The reference to “usual means of communication” in that definition contemplates an inquiry into the appropriateness of the method of transmission used in the particular circumstances involved.

10. Scope-Related Definitions.

a. **Expanded Scope of Article: “Agricultural Lien”; “Consignment”; “Payment Intangible”; “Promissory Note.”** These new definitions reflect the expanded scope of Article 9, as provided in Section 9-109(a).

b. **Reduced Scope of Exclusions: “Governmental Unit”; “Health-Care-Insurance Receivable”; “Commercial Tort Claims.”** These new definitions reflect the reduced scope of the exclusions, provided in Section 9-109(c) and (d), of transfers by governmental debtors and assignments of interests in insurance policies and commercial tort claims.

11. **Choice-of-Law-Related Definitions: “Certificate of Title”; “Governmental Unit”; “Jurisdiction of Organization”; “Public Organic Record”; “Registered Organization”; State.”** These new definitions reflect the changes in the law governing perfection and priority of security interests and agricultural liens provided in Part 3, Subpart 1.

Statutes often require applicants for a certificate of title to identify all security interests on the application and require the issuing agency to indicate the identified security interests on the certificate. Some of these statutes provide that priority over the rights of a lien creditor (i.e., perfection of a security interest) in goods covered by the certificate occurs upon indication of the security interest on the certificate; that is, they provide for the indication of the security interest on the certificate as a “condition” of perfection. Other statutes contemplate that perfection is achieved upon the occurrence of another act, e.g., delivery of the application to the issuing agency, that “results” in the indication of the security interest on the certificate. A certificate governed by either type of statute can qualify as a “certificate of title” under this Article. The statute providing for the indication of a security interest need not expressly state the connection between the indication and perfection. For example, a certificate issued pursuant to a statute that requires applicants to identify security interests, requires the issuing agency to indicate the identified security interests on the certificate, but is silent concerning the legal consequences of the indication would be a “certificate of title” if, under a judicial interpretation of the statute, perfection of a security interest is a legal consequence of the indication. Likewise, a certificate would be a “certificate of title” if another statute provides, expressly or as interpreted, the requisite connection between the indication and perfection.

The first sentence of the definition of “certificate of title” includes certificates consisting of tangible records, of electronic records, and

of combinations of tangible and electronic records.

In many States, a certificate of title covering goods that are encumbered by a security interest is delivered to the secured party by the issuing authority. To eliminate the need for the issuance of a paper certificate under these circumstances, several States have revised their certificate-of-title statutes to permit or require a State agency to maintain an electronic record that evidences ownership of the goods and in which a security interest in the goods may be noted. The second sentence of the definition provides that such a record is a “certificate of title” if it is in fact maintained as an alternative to the issuance of a paper certificate of title, regardless of whether the certificate-of-title statute provides that the record is a certificate of title and even if the statute does not expressly state that the record is maintained instead of issuing a paper certificate.

Not every organization that may provide information about itself in the public records is a “registered organization.” For example, a general partnership is not a “registered organization,” even if it files a statement of partnership authority under Section 303 of the Uniform Partnership Act (1994) or an assumed name (“dba”) certificate. This is because such a partnership is not formed or organized by the filing of a record with, or the issuance of a record by, a State or the United States. In contrast, corporations, limited liability companies, and limited partnerships ordinarily are “registered organizations.”

Not every record concerning a registered organization that is filed with, or issued by, a State or the United States is a “public organic record.” For example, a certificate of good standing issued with respect to a corporation or a published index of domestic corporations would not be a “public organic record” because its issuance or publication does not form or organize the corporations named.

When collateral is held in a trust, one must look to non-UCC law to determine whether the trust is a “registered organization.” Non-UCC law typically distinguishes between statutory trusts and common-law trusts. A statutory trust is formed by the filing of a record, commonly referred to as a certificate of trust, in a public office pursuant to a statute. See, e.g., Uniform Statutory Trust Entity Act § 201 (2009); Delaware Statutory Trust Act, Del. Code Ann. tit. 12, § 3801 et seq. A statutory trust is a juridical entity, separate from its trustee and beneficial owners, that may sue and be sued, own property, and transact business in its own name. Inasmuch as a statutory trust is a “legal or commercial entity,” it qualifies as a “person other than an individual,” and therefore as an “organization,” under Section 1-201. A statutory

trust that is formed by the filing of a record in a public office is a “registered organization,” and the filed record is a “public organic record” of the statutory trust, if the filed record is available to the public for inspection. (The requirement that a record be “available to the public for inspection” is satisfied if a copy of the relevant record is available for public inspection.)

Unlike a statutory trust, a common-law trust—whether its purpose is donative or commercial—arises from private action without the filing of a record in a public office. See Uniform Trust Code § 401 (2000); Restatement (Third) of Trusts § 10 (2003). Moreover, under traditional law, a common-law trust is not itself a juridical entity and therefore must sue and be sued, own property, and transact business in the name of the trustee acting in the capacity of trustee. A common-law trust that is a “business trust,” i.e., that has a business or commercial purpose, is an “organization” under Section 1-201. However, such a trust would not be a “registered organization” if, as is typically the case, the filing of a public record is not needed to form it.

In some states, however, the trustee of a common-law trust that has a commercial or business purpose is required by statute to file a record in a public office following the trust’s formation. See, e.g., Mass. Gen. Laws Ch. 182, § 2; Fla. Stat. Ann. § 609.02. A business trust that is required to file its organic record in a public office is a “registered organization” under the second sentence of the definition if the filed record is available to the public for inspection. Any organic record required to be filed, and filed, with respect to a common-law business trust after the trust is formed is a “public organic record” of the trust. Some statutes require a trust or other organization to file, after formation or organization, a record other than an organic record. See, e.g., N.Y. Gen. Assn’s Law § 18 (requiring associations doing business within New York to file a certificate designating the secretary of state as an agent upon whom process may be served). This requirement does not render the organization a “registered organization” under the second sentence of the definition, and the record is not a “public organic record.”

12. Deposit-Account-Related Definitions: “Deposit Account”; “Bank.” The revised definition of “deposit account” incorporates the definition of “bank,” which is new. The definition derives from the definitions of “bank” in Sections 4-105(1) and 4A-105(a)(2), which focus on whether the organization is “engaged in the business of banking.”

Deposit accounts evidenced by Article 9 “instruments” are excluded from the term “deposit account.” In contrast, former Section 9-105 excluded from the former definition “an account evidenced by a certificate of deposit.”

The revised definition clarifies the proper treatment of nonnegotiable or uncertificated certificates of deposit. Under the definition, an uncertificated certificate of deposit would be a deposit account (assuming there is no writing evidencing the bank’s obligation to pay) whereas a nonnegotiable certificate of deposit would be a deposit account only if it is not an “instrument” as defined in this section (a question that turns on whether the nonnegotiable certificate of deposit is “of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment.”)

A deposit account evidenced by an instrument is subject to the rules applicable to instruments generally. As a consequence, a security interest in such an instrument cannot be perfected by “control” (see Section 9-104), and the special priority rules applicable to deposit accounts (see Sections 9-327 and 9-340) do not apply.

The term “deposit account” does not include “investment property,” such as securities and security entitlements. Thus, the term also does not include shares in a money-market mutual fund, even if the shares are redeemable by check.

13. Proceeds-Related Definitions: “Cash Proceeds”; “Noncash Proceeds”; “Proceeds.” The revised definition of “proceeds” expands the definition beyond that contained in former Section 9-306 and resolves ambiguities in the former section.

a. Distributions on Account of Collateral. The phrase “whatever is collected on, or distributed on account of, collateral,” in subparagraph (B), is broad enough to cover cash or stock dividends distributed on account of securities or other investment property that is original collateral. Compare former Section 9-306 (“Any payments or distributions made with respect to investment property collateral are proceeds.”). This section rejects the holding of *Hastie v. FDIC*, 2 F.3d 1042 (10th Cir. 1993) (postpetition cash dividends on stock subject to a prepetition pledge are not “proceeds” under Bankruptcy Code Section 552(b)), to the extent the holding relies on the Article 9 definition of “proceeds.”

b. Distributions on Account of Supporting Obligations. Under subparagraph (B), collections on and distributions on account of collateral consisting of various credit-support arrangements (“supporting obligations,” as defined in Section 9-102) also are proceeds. Consequently, they are afforded treatment identical to proceeds collected from or distributed by the obligor on the underlying (supported) right to payment or other collateral. Proceeds of supporting obligations also are proceeds of the underlying rights to payment or other collateral.

c. **Proceeds of Proceeds.** The definition of “proceeds” no longer provides that proceeds of proceeds are themselves proceeds. That idea is expressed in the revised definition of “collateral” in Section 9-102. No change in meaning is intended.

d. **Proceeds Received by Person Who Did Not Create Security Interest.** When collateral is sold subject to a security interest and the buyer then resells the collateral, a question arose under former Article 9 concerning whether the “debtor” had “received” what the buyer received on resale and, therefore, whether those receipts were “proceeds” under former Section 9-306(2). This Article contains no requirement that property be “received” by the debtor for the property to qualify as proceeds. It is necessary only that the property be traceable, directly or indirectly, to the original collateral.

e. **Cash Proceeds and Noncash Proceeds.** The definition of “cash proceeds” is substantially the same as the corresponding definition in former Section 9-306. The phrase “and the like” covers property that is functionally equivalent to “money, checks, or deposit accounts,” such as some money-market accounts that are securities or part of securities entitlements. Proceeds other than cash proceeds are noncash proceeds.

14. **Consignment-Related Definitions: “Consignee”; “Consignment”; “Consignor.”** The definition of “consignment” excludes, in subparagraphs (B) and (C), transactions for which filing would be inappropriate or of insufficient benefit to justify the costs. A consignment excluded from the application of this Article by one of those subparagraphs may still be a true consignment; however, it is governed by non-Article 9 law. The definition also excludes, in subparagraph (D), what have been called “consignments intended for security.” These “consignments” are not bailments but secured transactions. Accordingly, all of Article 9 applies to them. See Sections 1-201(b)(35), 9-109(a)(1). The “consignor” is the person who delivers goods to the “consignee” in a consignment.

The definition of “consignment” requires that the goods be delivered “to a merchant for the purpose of sale.” If the goods are delivered for another purpose as well, such as milling or processing, the transaction is a consignment nonetheless because a purpose of the delivery is “sale.” On the other hand, if a merchant-processor-bailee will not be selling the goods itself but will be delivering to buyers to which the owner-bailor agreed to sell the goods, the transaction would not be a consignment.

15. **“Accounting.”** This definition describes the record and information that a debtor is entitled to request under Section 9-210.

16. **“Document.”** The definition of “document” incorporates both tangible and electronic documents of title. See Section 1-201(b)(16) and Comment 16.

17. **“Encumbrance”; “Mortgage.”** The definitions of “encumbrance” and “mortgage” are unchanged in substance from the corresponding definitions in former Section 9-105. They are used primarily in the special real-property-related priority and other provisions relating to crops, fixtures, and accessions.

18. **“Fixtures.”** This definition is unchanged in substance from the corresponding definition in former Section 9-313. See Section 9-334 (priority of security interests in fixtures and crops).

19. **“Good Faith.”** This Article expands the definition of “good faith” to include “the observance of reasonable commercial standards of fair dealing.” The definition in this section applies when the term is used in this Article, and the same concept applies in the context of this Article for purposes of the obligation of good faith imposed by Section 1-203. See subsection (c).

20. **“Lien Creditor.”** This definition is unchanged in substance from the corresponding definition in former Section 9-301.

21. **“New Value.”** This Article deletes former Section 9-108. Its broad formulation of new value, which embraced the taking of after-acquired collateral for a pre-existing claim, was unnecessary, counterintuitive, and ineffective for its original purpose of sheltering after-acquired collateral from attack as a voidable preference in bankruptcy. The new definition derives from Bankruptcy Code Section 547(a). The term is used with respect to temporary perfection of security interests in instruments, certificated securities, or negotiable documents under Section 9-312(e) and with respect to chattel paper priority in Section 9-330.

22. **“Person Related To.”** Section 9-615 provides a special method for calculating a deficiency or surplus when “the secured party, a person related to the secured party, or a secondary obligor” acquires the collateral at a foreclosure disposition. Separate definitions of the term are provided with respect to an individual secured party and with respect to a secured party that is an organization. The definitions are patterned on the corresponding definition in Section 1.301(32) of the Uniform Consumer Credit Code (1974).

23. **“Proposal.”** This definition describes a record that is sufficient to propose to retain collateral in full or partial satisfaction of a secured obligation. See Sections 9-620, 9-621, 9-622.

24. **“Pursuant to Commitment.”** This definition is unchanged in substance from the corresponding definition in former Section 9-105. It is used in connection with special

priority rules applicable to future advances. See Section 9-323.

25. **“Software.”** The definition of “software” is used in connection with the priority rules applicable to purchase-money security interests. See Sections 9-103, 9-324. Software, like a payment intangible, is a type of general intangible for purposes of this Article. See Comment 4.a., above, regarding the distinction between “goods” and “software.”

26. **Terminology: “Assignment” and “Transfer.”** In numerous provisions, this Article refers to the “assignment” or the “transfer” of property interests. These terms and their derivatives are not defined. This Article

generally follows common usage by using the terms “assignment” and “assign” to refer to transfers of rights to payment, claims, and liens and other security interests. It generally uses the term “transfer” to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction (see Section 9-107, Comment 4), no significance should be placed on the use of one term or the other. Depending on the context, each term may refer to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest.

28-9-103. Purchase-money security interest — Application of payments — Burden of establishing. — (a) In this section:

- (1) “Purchase-money collateral” means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and
- (2) “Purchase-money obligation” means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.
- (b) A security interest in goods is a purchase-money security interest:
 - (1) To the extent that the goods are purchase-money collateral with respect to that security interest;
 - (2) If the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and
 - (3) Also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.
- (c) A security interest in software is a purchase-money security interest to the extent that the security interest also secures a purchase-money obligation incurred with respect to goods in which the secured party holds or held a purchase-money security interest if:
 - (1) The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and
 - (2) The debtor acquired its interest in the software for the principal purpose of using the software in the goods.
- (d) The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.
- (e) If the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:
 - (1) In accordance with any reasonable method of application to which the parties agree;
 - (2) In the absence of the parties’ agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) to obligations that are not secured; and

(B) if more than one (1) obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

(f) A purchase-money security interest does not lose its status as such, even if:

(1) The purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(2) Collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(3) The purchase-money obligation has been renewed, refinanced, consolidated or restructured.

(g) A secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

History.

I.C., § 28-9-103, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-103, which comprised I.C., § 28-9-103, as added by 1979, ch. 299, § 6, p. 781; am. 1985, ch. 135, § 45, p. 329; am. 1995, ch. 272, § 3, p. 873; am. 1996, ch. 7, § 5, p. 9, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

In the adoption of this section, Idaho differed from the varied application of this section to consumer-goods and other than consumer-goods transactions in the uniform code.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Commingling of debt.

Money borrowed to pay existing loan.

Commingling of Debt.

Where debtor purchased household furnishings and electronic equipment under a series of four agreements, since the third agreement constituted a novation of second agreement, debt was not incurred for the purpose of purchasing the collateral to the second agreement and creditor did not have a purchase money security interest (PMSI) in that collateral; however the fourth agreement did not constitute a novation of the third agreement, and so creditor retained a PMSI in the property purchased under the third agreement and also retained a PMSI in the property purchased under the fourth agreement; the commingling of the PMSI debt with non-PMSI debt in the third and fourth agree-

ments did not transform the PMSI to a nonpurchase-money security interest; therefore, the debtors are entitled to avoid the liens against the property purchased by the second agreement but may not avoid the liens against property purchased under the third or fourth agreements. In re Butler, 160 Bankr. 155 (Bankr. D. Idaho 1993).

Money Borrowed to Pay Existing Loan.

Where, because a bank advanced \$12,346 for debtor to pay the first installment of loan made by a third party and secured by certain cows purchased by debtor with the proceeds of the original loan, and where it contends that it acquired the status of a lender with a purchase money security interest, at least in

the amount of this advancement, although the money advanced by bank was not used by the debtor to acquire any rights in the cows or the use of them because he already had all the possible rights in the cows he could have, nevertheless, since the bank's general security interest was perfected earlier in time than was that of the third party, accordingly, the third party could not prevail unless (1) he

had the super priority of a purchase money security interest, and this would require that he had filed under existing law so as to perfect his purchase money security interest, (2) the bank subordinated its security interest to third party's security interest, or (3) the bank was estopped to assert a prior security interest. *Valley Bank v. Estate of Rainsdon*, 117 Idaho 1085, 793 P.2d 1257 (Ct. App. 1990).

RESEARCH REFERENCES

A.L.R. — Consignment transactions under Uniform Commercial Code Article 9 on Secured Transactions. 58 A.L.R.6th 289.

OFFICIAL COMMENT

1. **Source.** Former Section 9-107.

2. **Scope of This Section.** Under Section 9-309(1), a purchase-money security interest in consumer goods is perfected when it attaches. Sections 9-317 and 9-324 provide special priority rules for purchase-money security interests in a variety of contexts. This section explains when a security interest enjoys purchase-money status.

3. **“Purchase-Money Collateral”; “Purchase-Money Obligation”; “Purchase-Money Security Interest.”** Subsection (a) defines “purchase-money collateral” and “purchase-money obligation.” These terms are essential to the description of what constitutes a purchase-money security interest under subsection (b). As used in subsection (a)(2), the definition of “purchase-money obligation,” the “price” of collateral or the “value given to enable” includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.

The concept of “purchase-money security interest” requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase-money security interest if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.

4. **Cross-Collateralization of Purchase-Money Security Interests in Inventory.** Subsection (b)(2) deals with the problem of cross-collateralized purchase-money security interests in inventory. Consider a simple example:

Example: Seller (S) sells an item of inventory (Item-1) to Debtor (D), retaining a security interest in Item-1 to secure Item-1's price

and all other obligations, existing and future, of D to S. S then sells another item of inventory to D (Item-2), again retaining a security interest in Item-2 to secure Item-2's price as well as all other obligations of D to S. D then pays to S Item-1's price. D then sells Item-2 to a buyer in ordinary course of business, who takes Item-2 free of S's security interest.

Under subsection (b)(2), S's security interest in *Item-1* securing *Item-2's unpaid price* would be a purchase-money security interest. This is so because S has a purchase-money security interest in Item-1, Item-1 secures the price of (a “purchase-money obligation incurred with respect to”) Item-2 (“other inventory”), and Item-2 itself was subject to a purchase-money security interest. Note that, to the extent Item-1 secures the price of Item-2, S's security interest in Item-1 would not be a purchase-money security interest under subsection (b)(1). The security interest in Item-1 is a purchase-money security interest under subsection (b)(1) only to the extent that Item-1 is “purchase-money collateral,” i.e., only to the extent that Item-1 “secures a purchase-money obligation incurred with respect to that collateral” (i.e., Item-1). See subsection (a)(1).

5. **Purchase-Money Security Interests in Goods and Software.** Subsections (b) and (c) limit purchase-money security interests to security interests in goods, including fixtures, and software. Otherwise, no change in meaning from former Section 9-107 is intended. The second sentence of former Section 9-115(5)(f) made the purchase-money priority rule (former Section 9-312(4)) inapplicable to investment property. This section's limitation makes that provision unnecessary.

Subsection (c) describes the limited circumstances under which a security interest in goods may be accompanied by a purchase-money security interest in software. The software must be acquired by the debtor in a

transaction integrated with the transaction in which the debtor acquired the goods, and the debtor must acquire the software for the principal purpose of using the software in the goods. "Software" is defined in Section 9-102.

6. Consignments. Under former Section 9-114, the priority of the consignor's interest is similar to that of a purchase-money security interest. Subsection (d) achieves this result more directly, by defining the interest of a "consignor," defined in Section 9-102, to be a purchase-money security interest in inventory for purposes of this Article. This drafting convention obviates any need to set forth special priority rules applicable to the interest of a consignor. Rather, the priority of the consignor's interest as against the rights of lien creditors of the consignee, competing secured parties, and purchasers of the goods from the consignee can be determined by reference to the priority rules generally applicable to inventory, such as Sections 9-317, 9-320, 9-322, and 9-324. For other purposes, including the rights and duties of the consignor and consignee as between themselves, the consignor would remain the owner of goods under a bailment arrangement with the consignee. See Section 9-319.

7. Provisions Applicable Only to Non-Consumer-Goods Transactions.

a. "Dual-Status" Rule. For transactions other than consumer-goods transactions, this Article approves what some cases have called the "dual-status" rule, under which a security interest may be a purchase-money security interest to some extent and a non-purchase-money security interest to some extent. (Concerning consumer-goods transactions, see subsection (h) and Comment 8.) Some courts have found this rule to be explicit or implicit in the words "to the extent," found in former Section 9-107 and continued in subsections (b)(1) and (b)(2). The rule is made explicit in subsection (e). For non-consumer-goods transactions, this Article rejects the "transformation" rule adopted by some cases, under which any cross-collateralization, refinancing, or the like destroys the purchase-money status entirely.

Consider, for example, what happens when a \$10,000 loan secured by a purchase-money security interest is refinanced by the original lender, and, as part of the transaction, the debtor borrows an additional \$2,000 secured by the collateral. Subsection (f) resolves any doubt that the security interest remains a purchase-money security interest. Under subsection (b), however, it enjoys purchase-money status only to the extent of \$10,000.

b. Allocation of Payments. Continuing with the example, if the debtor makes a \$1,000 payment on the \$12,000 obligation, then one must determine the extent to which the security interest remains a purchase-

money security interest—\$9,000 or \$10,000. Subsection (e)(1) expresses the overriding principle, applicable in cases other than consumer-goods transactions, for determining the extent to which a security interest is a purchase-money security interest under these circumstances: freedom of contract, as limited by principle of reasonableness. An unconscionable method of application, for example, is not a reasonable one and so would not be given effect under subsection (e)(1). In the absence of agreement, subsection (e)(2) permits the obligor to determine how payments should be allocated. If the obligor fails to manifest its intention, obligations that are not secured will be paid first. (As used in this Article, the concept of "obligations that are not secured" means obligations for which the debtor has not created a security interest. This concept is different from and should not be confused with the concept of an "unsecured claim" as it appears in Bankruptcy Code Section 506(a).) The obligor may prefer this approach, because unsecured debt is likely to carry a higher interest rate than secured debt. A creditor who would prefer to be secured rather than unsecured also would prefer this approach.

After the unsecured debt is paid, payments are to be applied first toward the obligations secured by purchase-money security interests. In the event that there is more than one such obligation, payments first received are to be applied to obligations first incurred. See subsection (e)(3). Once these obligations are paid, there are no purchase-money security interests and no additional allocation rules are needed.

Subsection (f) buttresses the dual-status rule by making it clear that (in a transaction other than a consumer-goods transaction) cross-collateralization and renewals, refinancings, and restructurings do not cause a purchase-money security interest to lose its status as such. The statutory terms "renewed," "refinanced," and "restructured" are not defined. Whether the terms encompass a particular transaction depends upon whether, under the particular facts, the purchase-money character of the security interest fairly can be said to survive. Each term contemplates that an identifiable portion of the purchase-money obligation could be traced to the new obligation resulting from a renewal, refinancing, or restructuring.

c. Burden of Proof. As is the case when the extent of a security interest is in issue, under subsection (g) the secured party claiming a purchase-money security interest in a transaction other than a consumer-goods transaction has the burden of establishing whether the security interest retains its purchase-money status. This is so whether the determination is to be made following a re-

newal, refinancing, or restructuring or otherwise.

8. Consumer-Goods Transactions; Characterization Under Other Law. Under subsection (h), the limitation of subsections (e), (f), and (g) to transactions other than consumer-goods transactions leaves to the court the determination of the proper rules in consumer-goods transactions. Subsection (h) also instructs the court not to draw any inference from this limitation as to the proper rules for consumer-goods transactions and leaves the court free to continue to apply established approaches to those transactions.

This section addresses only whether a security interest is a “purchase-money security interest” under this Article, primarily for purposes of perfection and priority. See, e.g.,

Sections 9-317, 9-324. In particular, its adoption of the dual-status rule, allocation of payments rules, and burden of proof standards for non-consumer-goods transactions is not intended to affect or influence characterizations under other statutes. Whether a security interest is a “purchase-money security interest” under other law is determined by that law. For example, decisions under Bankruptcy Code Section 522(f) have applied both the dual-status and the transformation rules. The Bankruptcy Code does not expressly adopt the state law definition of “purchase-money security interest.” Where federal law does not defer to this Article, this Article does not, and could not, determine a question of federal law.

28-9-104. Control of deposit account. — (a) A secured party has control of a deposit account if:

- (1) The secured party is the bank with which the deposit account is maintained;
- (2) The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or
- (3) The secured party becomes the bank’s customer with respect to the deposit account.

(b) A secured party that has satisfied subsection (a) of this section has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

History.

I.C., § 28-9-104, as added by 2001, ch. 208, § 2, p. 704

STATUTORY NOTES

Prior Laws.

Former § 28-9-104, which comprised 1967, ch. 161, § 9-104, p. 351; am. 1979, ch. 299,

§ 7, p. 781; am. 1996, ch. 7, § 6, p. 9; am. 1996, ch. 178, § 1, p. 567, was repealed by S.L. 2001, ch. 208, § 1.

OFFICIAL COMMENT

1. Source. New; derived from Section 8-106.

2. Why “Control” Matters. This section explains the concept of “control” of a deposit account. “Control” under this section may serve two functions. First, “control . . . pursuant to the debtor’s agreement” may substitute for an authenticated security agreement as an element of attachment. See Section 9-203(b)(3)(D). Second, when a deposit account is taken as original collateral, the only method of perfection is obtaining control under this section. See Section 9-312(b)(1).

3. Requirements for “Control.” This section derives from Section 8-106 of Revised Article 8, which defines “control” of securities and certain other investment property. Under subsection (a)(1), the bank with which the deposit account is maintained has control. The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary; all actual and potential creditors of the debtor are always on notice that the bank with which the debtor’s deposit account is maintained may assert a claim against the deposit account.

Example: D maintains a deposit account with Bank A. To secure a loan from Banks X, Y, and Z, D creates a security interest in the deposit account in favor of Bank A, as agent for Banks X, Y, and Z. Because Bank A is a “secured party” as defined in Section 9-102, the security interest is perfected by control under subsection (a)(1).

Under subsection (a)(2), a secured party may obtain control by obtaining the bank’s authenticated agreement that it will comply with the secured party’s instructions without further consent by the debtor. The analogous provision in Section 8-106 does not require that the agreement be authenticated. An agreement to comply with the secured party’s instructions suffices for “control” of a deposit account under this section even if the bank’s agreement is subject to specified conditions, e.g., that the secured party’s instructions are accompanied by a certification that the debtor is in default. (Of course, if the condition is the *debtor’s* further consent, the statute explicitly provides that the agreement would *not* confer control.) See revised Section 8-106, Comment 7.

Under subsection (a)(3), a secured party may obtain control by becoming the bank’s “customer,” as defined in Section 4-104. As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See Sections 4-401(a), 4-403(a).

As is the case with possession under Section 9-313, in determining whether a particular person has control under subsection (a), the principles of agency apply. See Section 1-103 and Restatement (3d), Agency § 8.12, Comment *b*.

Although the arrangements giving rise to control may themselves prevent, or may enable the secured party at its discretion to prevent, the debtor from reaching the funds on deposit, subsection (b) makes clear that the debtor’s ability to reach the funds is not inconsistent with “control.”

Perfection by control is not available for bank accounts evidenced by an instrument (e.g., certain certificates of deposit), which by definition are “instruments” and not “deposit accounts.” See Section 9-102 (defining “deposit account” and “instrument”).

28-9-105. Control of electronic chattel paper. — (a) A secured party has control of electronic chattel paper if a system employed for evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was assigned.

(b) A system satisfies subsection (a) of this section, and a secured party has control of electronic chattel paper, if the record or records comprising the chattel paper are created, stored and assigned in such a manner that:

- (1) A single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5) and (6) of this subsection, unalterable;
- (2) The authoritative copy identifies the secured party as the assignee of the record or records;
- (3) The authoritative copy is communicated to and maintained by the secured party or its designated custodian;
- (4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the secured party;
- (5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

History.

I.C., § 28-9-105, as added by 2001, ch. 208, § 2, p. 704; am. 2012, ch. 145, § 2, p. 381.

STATUTORY NOTES

Prior Laws.

Former § 28-9-105, which comprised 1967, ch. 161, § 9-105, p. 351; am. 1979, ch. 299, § 8, p. 781; am. 1985, ch. 135, § 46, p. 329; am. 1990, ch. 205, § 1, p. 457; am. 1995, ch. 272, § 4, p. 873; am. 1996, ch. 7, § 7, p. 9; am. 1996, ch. 178, § 2, p. 567, was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2012 amendment, by ch. 145, added subsection (a), designated the existing provi-

sions of the section as subsection (b); added “A system satisfies subsection (a) of this section” at the beginning of the introduction paragraph in subsection (b); substituted “consent” for “participation” near the end of paragraph (b)(4); and made stylistic changes throughout.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

OFFICIAL COMMENT

1. Source. New.

2. **“Control” of Electronic Chattel Paper.** This Article covers security interests in “electronic chattel paper,” a new term defined in Section 9-102. This section governs how “control” of electronic chattel paper may be obtained. Subsection (a), which derives from Section 16 of the Uniform Electronic Transactions Act, sets forth the general test for control. Subsection (b) sets forth a safe harbor test that, if satisfied, establishes control under the general test in subsection (a).

A secured party’s control of electronic chattel paper (i) may substitute for an authenticated security agreement for purposes of attachment under Section 9-203, (ii) is a method of perfection under Section 9-314, and (iii) is a condition for obtaining special, non-temporal priority under Section 9-330. Because electronic chattel paper cannot be transferred, assigned, or possessed in the same manner as tangible chattel paper, a special definition of control is necessary. In descriptive terms, this section provides that control of electronic chattel paper is the functional equivalent of possession of “tangible chattel paper” (a term also defined in Section 9-102).

3. **Development of Control Systems.** This Article leaves to the marketplace the development of systems and procedures, through a combination of suitable technologies and business practices, for dealing with control of electronic chattel paper in a commercial context. Systems that evolve for control of electronic chattel paper may or may not involve a third party custodian of the relevant records. As under UETA, a system must be shown to reliably establish that the secured party is the assignee of the chattel paper. Reliability is a high standard and encompasses the general principles of uniqueness, identifiability, and unalterability found in subsection (b) without setting forth specific guidelines as to how these principles must be achieved. However, the standards applied to determine whether a party is in control of

electronic chattel paper should not be more stringent than the standards now applied to determine whether a party is in possession of tangible chattel paper. For example, just as a secured party does not lose possession of tangible chattel paper merely by virtue of the possibility that a person acting on its behalf *could* wrongfully redeliver the chattel paper to the debtor, so control of electronic chattel paper would not be defeated by the possibility that the secured party’s interest *could* be subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.

This section and the concept of control of electronic chattel paper are not based on the same concepts as are control of deposit accounts (Section 9-104), security entitlements, a type of investment property (Section 9-106), and letter-of-credit rights (Section 9-107). The rules for control of those types of collateral are based on existing market practices and legal and regulatory regimes for institutions such as banks and securities intermediaries. Analogous practices for electronic chattel paper are developing nonetheless. The flexible approach adopted by this section, moreover, should not impede the development of these practices and, eventually, legal and regulatory regimes, which may become analogous to those for, e.g., investment property.

4. **“Authoritative Copy” of Electronic Chattel Paper.** One requirement for establishing control under subsection (b) is that a particular copy be an “authoritative copy.” Although other copies may exist, they must be distinguished from the authoritative copy. This may be achieved, for example, through the methods of authentication that are used or by business practices involving the marking of any additional copies. When tangible chattel paper is converted to electronic chattel paper, in order to establish that a copy of the electronic chattel paper is the authoritative copy it may be necessary to show that the tangible chattel paper no longer exists or has been permanently marked to indicate that it is not the authoritative copy.

28-9-106. Control of investment property. — (a) A person has control of a certificated security, uncertificated security, or security entitlement as provided in section 28-8-106[, Idaho Code].

(b) A secured party has control of a commodity contract if:

(1) The secured party is the commodity intermediary with which the commodity contract is carried; or

(2) The commodity customer, secured party and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(c) A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

History.

I.C., § 28-9-106, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-106, which comprised 1967, ch. 161, § 9-106, p. 351; am. 1979, ch. 299, § 9, p. 781; am. 1995, ch. 272, § 5, p. 873; am. 1996, ch. 7, § 8, p. 9, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertion at the end of subsection (a) was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. **Source.** Former Section 9-115(e).

2. **"Control" Under Article 8.** For an explanation of "control" of securities and certain other investment property, see Section 8-106, Comments 4 and 7.

3. **"Control" of Commodity Contracts.** This section, as did former Section 9-115(1)(e), contains provisions relating to control of commodity contracts which are analogous to those in Section 8-106 for other types of investment property.

4. **Securities Accounts and Commodity Accounts.** For drafting convenience, control with respect to a securities account or commodity account is defined in terms of obtain-

ing control over the security entitlements or commodity contracts. Of course, an agreement that provides that (without further consent of the debtor) the securities intermediary or commodity intermediary will honor instructions from the secured party concerning a securities account or commodity account described as such is sufficient. Such an agreement necessarily implies that the intermediary will honor instructions concerning all security entitlements or commodity contracts carried in the account and thus affords the secured party control of all the security entitlements or commodity contracts.

28-9-107. Control of letter of credit right. — A secured party has control of a letter of credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under section 28-5-114(3)[, Idaho Code,] or otherwise applicable law or practice.

History.

I.C., § 28-9-107, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-107, which comprised 1967, ch. 161, § 9-107, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertion in this section was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. Source. New.

2. "Control" of Letter-of-Credit Right.

Whether a secured party has control of a letter-of-credit right may determine the secured party's priority as against competing secured parties. See Section 9-329. This section provides that a secured party acquires control of a letter-of-credit right by receiving an assignment if the secured party obtains the consent of the issuer or any nominated person, such as a confirmer or negotiating bank, under Section 5-114 or other applicable law or practice. Because both issuers and nominated persons may give or be obligated to give value under a letter of credit, this section contemplates that a secured party obtains control of a letter-of-credit right with respect to the issuer or a particular nominated person only to the extent that the issuer or that nominated person consents to the assignment. For example, if a secured party obtains control to the extent of an issuer's obligation but fails to obtain the consent of a nominated person, the secured party does not have control to the extent that the nominated person gives value. In many cases the person or persons who will give value under a letter of credit will be clear from its terms. In other cases, prudence may suggest obtaining consent from more than one person. The details of the consenting issuer's or nominated person's duties to pay or otherwise render performance to the secured party are left to the agreement of the parties.

3. **"Proceeds of a Letter of Credit."** Section 5-114 follows traditional banking terminology by referring to a letter of credit beneficiary's assignment of its right to receive payment thereunder as an assignment of the "proceeds of a letter of credit." However, as the seller of goods can assign its right to receive payment (an "account") before it has been earned by delivering the goods to the buyer, so the beneficiary of a letter of credit can assign its contingent right to payment before the letter of credit has been honored. See Section 5-114(b). If the assignment creates a security interest, the security interest can be perfected

at the time it is created. An assignment of, including the creation of a security interest in, a letter-of-credit right is an assignment of a present interest.

4. **"Transfer" vs. "Assignment."** Letter-of-credit law and practice distinguish the "transfer" of a letter of credit from an "assignment." Under a transfer, the transferee itself becomes the beneficiary and acquires the right to draw. Whether a new, substitute credit is issued or the issuer advises the transferee of its status as such, the transfer constitutes a novation under which the transferee is the new, substituted beneficiary (but only to the extent of the transfer, in the case of a partial transfer).

Section 5-114(e) provides that the rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds. For this reason, transfer does not appear in this Article as a means of control or perfection. Section 9-109(c)(4) recognizes the independent and superior rights of a transferee beneficiary under Section 5-114(e); this Article does not apply to the rights of a transferee beneficiary or nominated person to the extent that those rights are independent and superior under Section 5-114.

5. **Supporting Obligation: Automatic Attachment and Perfection.** A letter-of-credit right is a type of "supporting obligation," as defined in Section 9-102. Under Sections 9-203 and 9-308, a security interest in a letter-of-credit right automatically attaches and is automatically perfected if the security interest in the supported obligation is a perfected security interest. However, unless the secured party has control of the letter-of-credit right or itself becomes a transferee beneficiary, it cannot obtain any rights against the issuer or a nominated person under Article 5. Consequently, as a practical matter, the secured party's rights would be limited to its ability to locate and identify proceeds distributed by the issuer or nominated person under the letter of credit.

28-9-108. Sufficiency of description. — (a) Except as otherwise provided in subsections (c), (d) and (e) of this section, a description of personal

or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Except as otherwise provided in subsection (d) of this section, a description of collateral reasonably identifies the collateral if it identifies the collateral by:

- (1) Specific listing;
- (2) Category;
- (3) Except as otherwise provided in subsection (e) of this section, a type of collateral defined in the uniform commercial code;
- (4) Quantity;
- (5) Computational or allocational formula or procedure; or
- (6) Except as otherwise provided in subsection (c) of this section, any other method, if the identity of the collateral is objectively determinable.

(c) A description of collateral as “all the debtor’s assets” or “all the debtor’s personal property” or using words of similar import does not reasonably identify the collateral.

(d) Except as otherwise provided in subsection (e) of this section, a description of a security entitlement, securities account or commodity account is sufficient if it describes:

- (1) The collateral by those terms or as investment property; or
- (2) The underlying financial asset or commodity contract.

(e) A description only by type of collateral defined in the uniform commercial code is an insufficient description of:

- (1) A commercial tort claim; or
- (2) In a consumer transaction, consumer goods, a security entitlement, a securities account or a commodity account.

History.

I.C., § 28-9-108, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-108, which comprised 1967,

ch. 161, § 9-108, p. 351, was repealed by S.L.
2001, ch. 208, § 1.

JUDICIAL DECISIONS

Description Sufficient.

Attorney’s security interest in the promissory note automatically attached to any proceeds of the note, including any rights arising out of the note. The security agreement did not limit the types of proceeds to which the attorney’s security interest would attach, because the attorney identified specific proceeds in the security agreement, including any judgments arising out of a collection action;

and a party who seeks to limit the type of statutory proceeds to which its security interest attaches must state an intent to limit proceeds in the security agreement. *Karle v. Visser*, 141 Idaho 804, 118 P.3d 136 (2005).

Cited in: *Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc.* (In re *Walter B. Scott & Sons, Inc.*), 436 B.R. 582 (Bankr. D. Idaho 2010).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Description.

Liberal construction.
Proceeds under contract.

Description.

Mortgaged property was sufficiently described if a stranger to the instrument may be able to locate and identify the same by inquiries suggested by the instrument itself. *McConnell v. Langdon*, 3 Idaho 157, 28 P. 403 (1891).

Chattel mortgage describing property as "1333 early spring lambs, branded O—" was sufficient as between parties to mortgage. *Hare v. Young*, 26 Idaho 691, 146 P. 107 (1915).

Where a chattel mortgage purported to cover crops grown upon certain described lands, and then provided "also all hay grown or now growing or to be grown, on all land owned, leased or controlled by mortgagor," this was sufficient to embrace crops grown on other land in the same county by the mortgagor, although the land was not described. *Livestock Credit Corp. v. Corbett*, 53 Idaho 190, 22 P.2d 874 (1933).

No security interest attached where security agreement did not describe land upon

which crops were growing or were to be grown and the financing statement did not contain language granting a security interest. *Kelley Bean Co. v. Victor*, 122 Idaho 395, 834 P.2d 912 (Ct. App. 1992).

Liberal Construction.

The policy of the code with regard to this section is quite liberal. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

Proceeds Under Contract.

Where assignment described the collateral as "all moneys now due or to become due under certain grain contracts held in your warehouse," such description minimally met the requirements of this section as to any grain contracts existing between assignor and grain concern at the time grain concern received notice of the assignment, but did not reasonably identify contracts subsequently entered into by the two parties. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

OPINIONS OF ATTORNEY GENERAL

The designation of the county alone is a reasonable and legally sufficient description of the real estate on which farm products are grown or located, for the purpose of perfecting

a security interest in farm products by filing a farm products financing statement. OAG 86-17.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-110, 9-115(3).

2. **General Rules.** Subsection (a) retains substantially the same formulation as former Section 9-110. Subsection (b) expands upon subsection (a) by indicating a variety of ways in which a description might reasonably identify collateral. Whereas a provision similar to subsection (b) was applicable only to investment property under former Section 9-115(3), subsection (b) applies to all types of collateral, subject to the limitation in subsection (d). Subsection (b) is subject to subsection (c), which follows prevailing case law and adopts the view that an "all assets" or "all personal property" description for purposes of a *security agreement* is not sufficient. Note, however, that under Section 9-504, a *financing statement* sufficiently indicates the collateral if it "covers all assets or all personal property."

The purpose of requiring a description of collateral in a security agreement under Section 9-203 is evidentiary. The test of sufficiency of a description under this section, as

under former Section 9-110, is that the description do the job assigned to it: make possible the identification of the collateral described. This section rejects any requirement that a description is insufficient unless it is exact and detailed (the so-called "serial number" test).

3. **After-Acquired Collateral.** Much litigation has arisen over whether a description in a security agreement is sufficient to include after-acquired collateral if the agreement does not explicitly so provide. This question is one of contract interpretation and is not susceptible to a statutory rule (other than a rule to the effect that it is a question of contract interpretation). Accordingly, this section contains no reference to descriptions of after-acquired collateral.

4. **Investment Property.** Under subsection (d), the use of the wrong Article 8 terminology does not render a description invalid (e.g., a security agreement intended to cover a debtor's "security entitlements" is sufficient if it refers to the debtor's "securities"). Note also that given the broad definition of "securities

account” in Section 8-501, a security interest in a securities account also includes all other rights of the debtor against the securities intermediary arising out of the securities account. For example, a security interest in a securities account would include credit balances due to the debtor from the securities intermediary, whether or not they are proceeds of a security entitlement. Moreover, describing collateral as a securities account is a simple way of describing all of the security entitlements carried in the account.

5. Consumer Investment Property; Commercial Tort Claims. Subsection (e) requires greater specificity of description in order to prevent debtors from inadvertently encumbering certain property. Subsection (e) requires that a description by defined “type” of collateral alone of a commercial tort claim or, in a consumer transaction, of a security entitlement, securities account, or commodity account, is not sufficient. For example, “all existing and after-acquired investment property” or “all existing and after-acquired security entitlements,” without more, would be insufficient in a consumer transaction to de-

scribe a security entitlement, securities account, or commodity account. The reference to “only by type” in subsection (e) means that a description is sufficient if it satisfies subsection (a) and contains a descriptive component beyond the “type” alone. Moreover, if the collateral consists of a securities account or commodity account, a description of the account is sufficient to cover all existing and future security entitlements or commodity contracts carried in the account. See Section 9-203(h), (i).

Under Section 9-204, an after-acquired collateral clause in a security agreement will not reach future commercial tort claims. It follows that when an effective security agreement covering a commercial tort claim is entered into the claim already will exist. Subsection (e) does not require a description to be specific. For example, a description such as “all tort claims arising out of the explosion of debtor’s factory” would suffice, even if the exact amount of the claim, the theory on which it may be based, and the identity of the tortfeasor(s) are not described. (Indeed, those facts may not be known at the time.)

28-9-109. Scope. — (a) Except as otherwise provided in subsections (c) and (d), this chapter applies to:

- (1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;
- (2) An agricultural lien;
- (3) A sale of accounts, chattel paper, payment intangibles or promissory notes;
- (4) A consignment;
- (5) A security interest arising under section 28-2-401, 28-2-505, 28-2-711(3) or 28-12-508(5)[, Idaho Code], as provided in section 28-9-110[, Idaho Code]; and
- (6) A security interest arising under section 28-4-210 or 28-5-120[, Idaho Code].

(b) The application of this chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this chapter does not apply.

(c) This chapter does not apply to the extent that:

- (1) A statute, regulation, or treaty of the United States preempts this chapter;
- (2) Another statute of this state expressly governs the creation, perfection, priority or enforcement of a security interest created by this state or a governmental unit of this state;
- (3) A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority or enforcement of a security interest created by the state, country or governmental unit; or
- (4) The rights of a transferee beneficiary or nominated person under a

letter of credit are independent and superior under section 28-5-114[, Idaho Code].

(d) This chapter does not apply to:

- (1) A landlord's lien, other than an agricultural lien;
- (2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but section 28-9-333[, Idaho Code,] applies with respect to priority of the lien;
- (3) An assignment of a claim for wages, salary or other compensation of an employee;
- (4) A sale of accounts, chattel paper, payment intangibles or promissory notes as part of a sale of the business out of which they arose;
- (5) An assignment of accounts, chattel paper, payment intangibles or promissory notes which is for the purpose of collection only;
- (6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;
- (7) An assignment of a single account, payment intangible or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;
- (8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health care provider of a health care insurance receivable and any subsequent assignment of the right to payment, but sections 28-9-315 and 28-9-322[, Idaho Code,] apply with respect to proceeds and priorities in proceeds;
- (9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;
- (10) A right of recoupment or set-off, but:
 - (A) section 28-9-340[, Idaho Code,] applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and
 - (B) section 28-9-404[, Idaho Code,] applies with respect to defenses or claims of an account debtor;
- (11) The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:
 - (A) liens on real property in sections 28-9-203 and 28-9-308[, Idaho Code];
 - (B) fixtures in section 28-9-334[, Idaho Code];
 - (C) fixture filings in sections 28-9-501, 28-9-502, 28-9-512, 28-9-516 and 28-9-519[, Idaho Code]; and
 - (D) security agreements covering personal and real property in section 28-9-604[, Idaho Code];
- (12) An assignment of a claim arising in tort, other than a commercial tort claim, but sections 28-9-315 and 28-9-322[, Idaho Code,] apply with respect to proceeds and priorities in proceeds;
- (13)(A) A claim or right to receive compensation for injuries or sickness as described in (i) 26 U.S.C. section 104(a)(1) and (ii) on and after the effective date of this chapter, in 26 U.S.C. section 104(a)(2), as those sections may be amended from time to time. Notwithstanding the foregoing, this chapter (other than sections 28-9-406(d) and 28-9-408(a)

and (c), Idaho Code, in the case of transfers made on and after the effective date of this chapter) shall apply to such compensation as described in 26 U.S.C. section 104(a)(2) if the sale, pledge, assignment or other transfer of rights to receive such compensation under a structured settlement is approved by the final order of a court pursuant to, and otherwise complies with, the requirements of paragraph (B) of this subsection.

(B)(i) Definitions. For purposes of this subsection:

1. “annuity issuer” means an insurer that has issued a contract to fund periodic payments under a structured settlement;
2. “dependents” include a payee’s spouse and minor children and all other persons for whom the payee is legally obligated to provide support, including alimony;
3. “discounted present value” means the present value of future payments determined by discounting such payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States internal revenue service;
4. “gross advance amount” means the sum payable to the payee or for the payee’s account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from such consideration;
5. “independent professional advice” means advice of an attorney, certified public accountant, actuary or other licensed professional adviser;
6. “interested parties” means, with respect to any structured settlement, the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee’s death, the annuity issuer, the structured settlement obligor, and any other party that has continuing rights or obligations under such structured settlement;
7. “net advance amount” means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under paragraph (B)(ii)5. of this subsection;
8. “payee” means an individual who is receiving tax free payments under a structured settlement and proposes to make a transfer of payment rights thereunder;
9. “periodic payments” includes both recurring payments and scheduled future lump sum payments;
10. “qualified assignment agreement” means an agreement providing for a qualified assignment within the meaning of 26 U.S.C. section 130, as amended from time to time;
11. “settled claim” means the original tort claim resolved by a structured settlement;
12. “structured settlement” means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim;

13. “structured settlement agreement” means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement;
14. “structured settlement obligor” means, with respect to any structured settlement, the party that has the continuing obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement;
15. “structured settlement payment rights” means rights to receive periodic payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, where:
- A. the payee is domiciled in, or the domicile or principal place of business of the structured settlement obligor or the annuity issuer is located in, this state; or
 - B. the structured settlement agreement was approved by a court in this state; or
 - C. the structured settlement agreement is expressly governed by the laws of this state;
16. “terms of the structured settlement” include, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement and any order or other approval of any court or other government authority that authorized or approved such structured settlement;
17. “transfer” means any sale, assignment, pledge, hypothecation or other alienation or encumbrance of structured settlement payment rights made by a payee for consideration; provided that the term “transfer” does not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to such insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce such blanket security interest against the structured settlement payment rights;
18. “transfer agreement” means the agreement providing for a transfer of structured settlement payment rights;
19. “transfer expenses” means all expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including, without limitation, court filing fees, attorney’s fees, escrow fees, lien recordation fees, judgment and lien search fees, finder’s fees, commissions, and other payments to a broker or other intermediary; “transfer expenses” do not include preexisting obligations of the payee payable for the payee’s account from the proceeds of a transfer;
20. “transferee” means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.
- (ii) Required disclosures to payee. Not less than three (3) days prior to the date on which a payee signs a transfer agreement, the

transferee shall provide to the payee a separate disclosure statement, in bold type no smaller than fourteen (14) points, setting forth:

1. the amounts and due dates of the structured settlement payments to be transferred;
2. the aggregate amount of such payments;
3. the discounted present value of the payments to be transferred, which shall be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities," and the amount of the applicable federal rate used in calculating such discounted present value;
4. the gross advance amount;
5. an itemized listing of all applicable transfer expenses, other than attorney's fees and related disbursements payable in connection with the transferee's application for approval of the transfer, and the transferee's best estimate of the amount of any such fees and disbursements;
6. the net advance amount;
7. the amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and
8. a statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee.

(iii) Approval of transfers of structured settlement payment rights.

1. No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order based on express findings by such court that:

- A. the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents;
- B. the payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived such advice in writing; and
- C. the transfer does not contravene any applicable statute or the order of any court or other government authority.

(iv) Effects of transfer of structured settlement payment rights. Following a transfer of structured settlement payment rights under this subsection:

1. The structured settlement obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments;
2. The transferee shall be liable to the structured settlement obligor and the annuity issuer:
 - A. if the transfer contravenes the terms of the structured settle-

ment, for any taxes incurred by such parties as a consequence of the transfer; and

B. for any other liabilities or costs, including reasonable costs and attorney's fees, arising from compliance by such parties with the order of the court or arising as a consequence of the transferee's failure to comply with this subsection;

3. Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two (2) or more transferees or assignees; and

4. Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this subsection.

(v) Procedure for approval of transfers.

1. An application under this subsection for approval of a transfer of structured settlement payment rights shall be made by the transferee and may be brought in the county in which the payee resides, in the county in which the structured settlement obligor or the annuity issuer maintains its principal place of business, or in any court which approved the structured settlement agreement.

2. Not less than twenty (20) days prior to the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under paragraph (B)(iii) of this subsection, the transferee shall file with the court and serve on all interested parties a notice of the proposed transfer and the application for its authorization, including with such notice:

A. a copy of the transferee's application;

B. a copy of the transfer agreement;

C. a copy of the disclosure statement required under paragraph (B)(ii) of this subsection;

D. a listing of each of the payee's dependents, together with each dependent's age;

E. notification that any interested party is entitled to support, oppose or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing; and

F. notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed (which shall be not less than fifteen (15) days after service of the transferee's notice) in order to be considered by the court.

(vi) General provisions—construction.

1. The provisions of this subsection may not be waived by any payee.

2. Any transfer agreement entered into on or after the effective date of this subsection by a payee who resides in this state shall provide that disputes under such transfer agreement, including any claim that the payee has breached the agreement, shall be

determined in and under the laws of this state. No such transfer agreement shall authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

3. No transfer of structured settlement payment rights shall extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the structured settlement obligor for (i) periodically confirming the payee's survival, and (ii) giving the annuity issuer and the structured settlement obligor prompt written notice in the event of the payee's death.

4. No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on any failure of such transfer to satisfy the conditions of this subsection.

5. Nothing contained in this subsection shall be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into prior to the effective date of this subsection is valid or invalid.

6. Compliance with the requirements set forth in paragraph (B)(ii) of this subsection and fulfillment of the conditions set forth in paragraph (B)(iii) of this subsection shall be solely the responsibility of the transferee in any transfer of structured settlement payment rights, and neither the structured settlement obligor nor the annuity issuer shall bear any responsibility for, or any liability arising from, noncompliance with such requirements or failure to fulfill such conditions.

(vii) Effective date. This subsection shall apply to any transfer of structured settlement payment rights under a transfer agreement entered into on or after the thirtieth day after the date of enactment of this subsection; provided however, that nothing contained herein shall imply that any transfer under a transfer agreement reached prior to such date is either effective or ineffective; or

(14) A claim or right to receive benefits under a special needs trust as described in 42 U.S.C. section 1396p(d)(4), as amended from time to time.

History.

I.C., § 28-9-109, as added by 2001, ch. 208,
§ 2, p. 704; am. 2001, ch. 299, § 1, p. 1078.

STATUTORY NOTES

Prior Laws.

Former § 28-9-109, which comprised 1967,

ch. 161, § 9-109, p. 351; am. 1987, ch. 284,
§ 3, p. 596, was repealed by S.L. 2001, ch.

208, § 1.

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

The phrase "the effective date of this chapter," used twice in paragraph (d)(13)(A), refers to the effective date of S.L. 2001, ch. 299, which was July 1, 2001.

The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

ANALYSIS

Assignment of structured settlement rights.
Security interest.

Assignment of Structured Settlement Rights.

Subsection (d)(13)(B)(v), "Structured Settlement Protection Act" does not affect transfer agreements reached prior to its enactment; thus, a settlement payee's purported assignment of a payment transferred nothing, notwithstanding court approval of the assignment, because the payee had previously assigned the payment to another party and, thus, had lost control of the payment. *Foley v. Grigg*, 144 Idaho 530, 164 P.3d 810 (2007).

Security Interest.

Attorney's security interest in the promis-

sory note automatically attached to any proceeds of the note, including any rights arising out of the note. The attorney identified specific proceeds in the security agreement, including any judgments arising out of a collection action; and a party who seeks to limit the type of statutory proceeds to which its security interest attaches must state an intent to limit proceeds in the security agreement. *Karle v. Visser*, 141 Idaho 804, 118 P.3d 136 (2005).

Cited in: *Wiggins v. Peachtree Settlement Funding*, 273 Bankr. 839 (Bankr. D. Idaho 2001).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Lease of real property.
Security interest.

Lease of Real Property.

A lease of real property is excluded from the scope of Title 28, Chapter 9 of the Idaho Code (Article 9 of the Uniform Commercial Code) by this section. *Trustee Servs. Corp. v. East River Lumber Co. (In re Hodge Forest Indus., Inc.)*, 59 Bankr. 801 (Bankr. D. Idaho 1986).

Security Interest.

Where the evidence was clear that although a lease agreement did contain some attributes of an installment sales contract, there was no oral or written option to purchase the equipment, and title did not pass to the lessee at the end of the term, and since no other relevant evidence was presented demonstrating

that the parties intended the transaction to be anything other than a lease, the trial court properly held that the lease agreement was not a security interest subject to Article 9 of the UCC. *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982).

No magic words are necessary to create a security interest, and the agreement itself need not even contain the term "security interest"; this is in keeping with the policy of the code that form should not prevail over substance and that, whenever possible, effect should be given to the parties' intent. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

OPINIONS OF ATTORNEY GENERAL

Personal property tax liens are entitled to first priority, even over antecedent encum-

brances, including prior perfected purchase money security interests. OAG 85-1.

RESEARCH REFERENCES

Am. Jur. — 15A Am. Jur. 2d, Commercial Code, § 10.

A.L.R. — Consignment transactions under

Uniform Commercial Code Article 9 on Secured Transactions. 58 A.L.R.6th 289.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-102, 9-104.

2. **Basic Scope Provision.** Subsection (a)(1) derives from former Section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d). As to which transactions give rise to a "security interest," the definition of that term in Section 1-201 must be consulted. When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it. Likewise, the subjective intention of the parties with respect to the legal characterization of their transaction is irrelevant to whether this Article applies, as it was to the application of former Article 9 under the proper interpretation of former Section 9-102.

3. **Agricultural Liens.** Subsection (a)(2) is new. It expands the scope of this Article to cover agricultural liens, as defined in Section 9-102.

4. **Sales of Accounts, Chattel Paper, Payment Intangibles, Promissory Notes, and Other Receivables.** Under subsection (a)(3), as under former Section 9-102, this Article applies to sales of accounts and chattel paper. This approach generally has been successful in avoiding difficult problems of distinguishing between transactions in which a receivable secures an obligation and those in which the receivable has been sold outright. In many commercial financing transactions the distinction is blurred.

Subsection (a)(3) expands the scope of this Article by including the sale of a "payment intangible" (defined in Section 9-102 as "a general intangible under which the account debtor's principal obligation is a monetary obligation") and a "promissory note" (also defined in Section 9-102). To a considerable extent, this Article affords these transactions treatment identical to that given sales of accounts and chattel paper. In some respects, however, sales of payment intangibles and promissory notes are treated differently from sales of other receivables. See, e.g., Sections 9-309 (automatic perfection upon attachment), 9-408 (effect of restrictions on assignment). By virtue of the expanded definition of "account" (defined in Section 9-102), this Article now covers sales of (and other security

interests in) "health-care-insurance receivables" (also defined in Section 9-102). Although this Article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of "security interest" (Section 1-201(37)) delineates how a particular transaction is to be classified. That issue is left to the courts.

5. **Transfer of Ownership in Sales of Receivables.** A "sale" of an account, chattel paper, a promissory note, or a payment intangible includes a sale of a right in the receivable, such as a sale of a participation interest. The term also includes the sale of an enforcement right. For example, a "[p]erson entitled to enforce" a negotiable promissory note (Section 3-301) may sell its ownership rights in the instrument. See Section 3-203, Comment 1 ("Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203."). Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section. This Article rejects decisions reaching a contrary result, e.g., *Dennis Joslin Co. v. Robinson Broadcasting*, 977 F. Supp. 491 (D.D.C. 1997).

Nothing in this section or any other provision of Article 9 prevents the transfer of full and complete ownership of an account, chattel paper, an instrument, or a payment intangible in a transaction of sale. However, as mentioned in Comment 4, neither this Article nor the definition of "security interest" in Section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation. This Article applies to both types of transactions. The principal effect of this coverage is to apply this Article's perfection and priority rules to these sales transactions. Use of terminology such as "security interest," "debtor," and "collateral" is merely a drafting convention adopted to reach this end, and its use has no relevance to distinguishing sales from other transactions. See PEB Commentary No. 14.

Following a debtor's outright sale and transfer of ownership of a receivable, the

debtor-seller retains no legal or equitable rights in the receivable that has been sold. See Section 9-318(a). This is so whether or not the buyer's security interest is perfected. (A security interest arising from the sale of a promissory note or payment intangible is perfected upon attachment without further action. See Section 9-309.) However, if the buyer's interest in accounts or chattel paper is unperfected, a subsequent lien creditor, perfected secured party, or qualified buyer can reach the sold receivable and achieve priority over (or take free of) the buyer's unperfected security interest under Section 9-317. This is so not because the seller of a receivable retains rights in the property sold; it does not. Nor is this so because the seller of a receivable is a "debtor" and the buyer of a receivable is a "secured party" under this Article (they are). It is so for the simple reason that Sections 9-318(b), 9-317, and 9-322 make it so, as did former Sections 9-301 and 9-312. Because the buyer's security interest is unperfected, for purposes of determining the rights of creditors of and purchasers for value from the debtor-seller, under Section 9-318(b) the debtor-seller is deemed to have the rights and title it sold. Section 9-317 subjects the buyer's unperfected interest in accounts and chattel paper to that of the debtor-seller's lien creditor and other persons who qualify under that section.

6. Consignments. Subsection (a)(4) is new. This Article applies to every "consignment." The term, defined in Section 9-102, includes many but not all "true" consignments (i.e., bailments for the purpose of sale). If a transaction is a "sale or return," as defined in revised Section 2-326, it is not a "consignment." In a "sale or return" transaction, the buyer becomes the owner of the goods, and the seller may obtain an enforceable security interest in the goods only by satisfying the requirements of Section 9-203.

Under common law, creditors of a bailee were unable to reach the interest of the bailor (in the case of a consignment, the consignor-owner). Like former Section 2-326 and former Article 9, this Article changes the common-law result; however, it does so in a different manner. For purposes of determining the rights and interests of third-party creditors of, and purchasers of the goods from, the consignee, but not for other purposes, such as remedies of the consignor, the consignee is deemed to acquire under this Article whatever rights and title the consignor had or had power to transfer. See Section 9-319. The interest of a consignor is defined to be a security interest under revised Section 1-201(37), more specifically, a purchase-money security interest in the consignee's inventory. See Section 9-103(d). Thus, the rules pertaining to lien creditors, buyers, and

attachment, perfection, and priority of competing security interests apply to consigned goods. The relationship between the consignor and consignee is left to other law. Consignors also have no duties under Part 6. See Section 9-601(g).

Sometimes parties characterize transactions that secure an obligation (other than the bailee's obligation to returned bailed goods) as "consignments." These transactions are not "consignments" as contemplated by Section 9-109(a)(4). See Section 9-102. This Article applies also to these transactions, by virtue of Section 9-109(a)(1). They create a security interest within the meaning of the first sentence of Section 1-201(37).

This Article does not apply to bailments for sale that fall outside the definition of "consignment" in Section 9-102 and that do not create a security interest that secures an obligation.

7. Security Interest in Obligation Secured by Non-Article 9 Transaction. Subsection (b) is unchanged in substance from former Section 9-102(3). The following example provides an illustration.

Example 1: O borrows \$10,000 from M and secures its repayment obligation, evidenced by a promissory note, by granting to M a mortgage on O's land. This Article does not apply to the creation of the real-property mortgage. However, if M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, this Article applies to the security interest thereby created in favor of X. The security interest in the promissory note is covered by this Article even though the note is secured by a real-property mortgage. Also, X's security interest in the note gives X an attached security interest in the mortgage lien that secures the note and, if the security interest in the note is perfected, the security interest in the mortgage lien likewise is perfected. See Sections 9-203, 9-308.

It also follows from subsection (b) that an attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective. Finally, it is implicit from subsection (b) that one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation. This Article rejects cases such as *In re Maryville Savings & Loan Corp.*, 743 F.2d 413 (6th Cir. 1984), clarified on reconsideration, 760 F.2d 119 (1985).

8. Federal Preemption. Former Section 9-104(a) excluded from Article 9 "a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties

affected by transactions in particular types of property.” Some (erroneously) read the former section to suggest that Article 9 sometimes deferred to federal law even when federal law did not preempt Article 9. Subsection (c)(1) recognizes explicitly that this Article defers to federal law only when and to the extent that it must—i.e., when federal law preempts it.

9. Governmental Debtors. Former Section 9-104(e) excluded transfers by governmental debtors. It has been revised and replaced by the exclusions in new paragraphs (2) and (3) of subsection (c). These paragraphs reflect the view that Article 9 should apply to security interests created by a State, foreign country, or a “governmental unit” (defined in Section 9-102) of either except to the extent that another statute governs the issue in question. Under paragraph (2), this Article defers to all statutes of the forum State. (A forum cannot determine whether it should consult the choice-of-law rules in the forum’s UCC unless it first determines that its UCC applies to the transaction before it.) Paragraph (3) defers to statutes of another State or a foreign country only to the extent that those statutes contain rules applicable specifically to security interests created by the governmental unit in question.

Example 2: A New Jersey state commission creates a security interest in favor of a New York bank. The validity of the security interest is litigated in New York. The relevant security agreement provides that it is governed by New York law. To the extent that a New Jersey statute contains rules peculiar to creation of security interests by governmental units generally, to creation of security interests by state commissions, or to creation of security interests by this particular state commission, then that law will govern. On the other hand, to the extent that New Jersey law provides that security interests created by governmental units, state commissions, or this state commission are governed by the law generally applicable to secured transactions (i.e., New Jersey’s Article 9), then New York’s Article 9 will govern.

Example 3: An airline that is an instrumentality of a foreign country creates a security interest in favor of a New York bank. The analysis used in the previous example would apply here. That is, if the matter is litigated in New York, New York law would govern except to the extent that the foreign country enacted a statute applicable to security interests created by governmental units generally or by the airline specifically.

The fact that New York law applies does not necessarily mean that perfection is accomplished by filing in New York. Rather, it means that the court should apply New York’s Article 9, including its choice-of-law provisions. Under New York’s Section 9-301, per-

fection is governed by the law of the jurisdiction in which the debtor is located. Section 9-307 determines the debtor’s location for choice-of-law purposes.

If a transaction does not bear an appropriate relation to the forum State, then that State’s Article 9 will not apply, regardless of whether the transaction would be excluded by paragraph (3).

Example 4: A Belgian governmental unit grants a security interest in its equipment to a Swiss secured party. The equipment is located in Belgium. A dispute arises and, for some reason, an action is brought in a New Mexico state court. Inasmuch as the transaction bears no “appropriate relation” to New Mexico, New Mexico’s UCC, including its Article 9, is inapplicable. See Section 1-105(1). New Mexico’s Section 9-109(c) on excluded transactions should not come into play. Even if the parties agreed that New Mexico law would govern, the parties’ agreement would not be effective because the transaction does not bear a “reasonable relation” to New Mexico. See Section 1-105(1).

Conversely, Article 9 will come into play only if the litigation arises in a UCC jurisdiction or if a foreign choice-of-law rule leads a foreign court to apply the law of a UCC jurisdiction. For example, if issues concerning a security interest granted by a foreign airline to a New York bank are litigated overseas, the court may be bound to apply the law of the debtor’s jurisdiction and not New York’s Article 9.

10. Certain Statutory and Common-Law Liens; Interests in Real Property. With few exceptions (nonconsensual agricultural liens being one), this Article applies only to consensual security interests in personal property. Following former Section 9-104(b) and (j), paragraphs (1) and (11) of subsection (d) exclude landlord’s liens and leases and most other interests in or liens on real property. These exclusions generally reiterate the limitations on coverage (i.e., “by contract,” “in personal property and fixtures”) made explicit in subsection (a)(1). Similarly, most jurisdictions provide special liens to suppliers of many types of services and materials, either by statute or by common law. With the exception of agricultural liens, it is not necessary for this Article to provide general codification of this lien structure, which is determined in large part by local conditions and which is far removed from ordinary commercial financing. As under former Section 9-104(c), subsection (d)(2) excludes these suppliers’ liens (other than agricultural liens) from this Article. However, Section 9-333 provides a rule for determining priorities between certain possessory suppliers’ liens and security interests covered by this Article.

11. **Wage and Similar Claims.** As under former Section 9-104(d), subsection (d)(3) excludes assignments of claims for wages and the like from this Article. These assignments present important social issues that other law addresses. The Federal Trade Commission has ruled that, with some exceptions, the taking of an assignment of wages or other earnings is an unfair act or practice under the Federal Trade Commission Act. See 16 C.F.R. Part 444. State statutes also may regulate such assignments.

12. **Certain Sales and Assignments of Receivables; Judgments.** In general this Article covers security interests in (including sales of) accounts, chattel paper, payment intangibles, and promissory notes. Paragraphs (4), (5), (6), and (7) of subsection (d) exclude from the Article certain sales and assignments of receivables that, by their nature, do not concern commercial financing transactions. These paragraphs add to the exclusions in former Section 9-104(f) analogous sales and assignments of payment intangibles and promissory notes. For similar reasons, subsection (d)(9) retains the exclusion of assignments of judgments under former Section 9-104(h) (other than judgments taken on a right to payment that itself was collateral under this Article).

13. **Insurance.** Subsection (d)(8) narrows somewhat the broad exclusion of interests in insurance policies under former Section 9-104(g). This Article now covers assignments by or to a health-care provider of "health-care insurance receivables" (defined in Section 9-102).

14. **Set-Off.** Subsection (d)(10) adds two exceptions to the general exclusion of set-off rights from Article 9 under former Section 9-104(i). The first takes account of new Section 9-340, which regulates the effectiveness of a set-off against a deposit account that stands as collateral. The second recognizes Section 9-404, which affords the obligor on an account, chattel paper, or general intangible the right to raise claims and defenses against an assignee (secured party).

15. **Tort Claims.** Subsection (d)(12) narrows somewhat the broad exclusion of transfers of tort claims under former Section 9-104(k). This Article now applies to assignments of "commercial tort claims" (defined in Section 9-102) as well as to security interests in tort claims that constitute proceeds of other collateral (e.g., a right to payment for negligent destruction of the debtor's inventory). Note that once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort.

This Article contains two special rules governing creation of a security interest in tort

claims. First, a description of collateral in a security agreement as "all tort claims" is insufficient to meet the requirement for attachment. See Section 9-108(e). Second, no security interest attaches under an after-acquired property clause to a tort claim. See Section 9-204(b). In addition, this Article does not determine whom the tortfeasor must pay to discharge its obligation. Inasmuch as a tortfeasor is not an "account debtor," the rules governing waiver of defenses and discharge of an obligation by an obligor (Sections 9-403, 9-404, 9-405, and 9-406) are inapplicable to tort-claim collateral.

16. **Deposit Accounts.** Except in consumer transactions, deposit accounts may be taken as original collateral under this Article. Under former Section 9-104(l), deposit accounts were excluded as original collateral, leaving security interests in deposit accounts to be governed by the common law. The common law is nonuniform, often difficult to discover and comprehend, and frequently costly to implement. As a consequence, debtors who wished to use deposit accounts as collateral sometimes were precluded from doing so as a practical matter. By excluding deposit accounts from the Article's scope as original collateral in consumer transactions, subsection (d)(13) leaves those transactions to law other than this Article. However, in both consumer and non-consumer transactions, sections 9-315 and 9-322 apply to deposit accounts as proceeds and with respect to priorities in proceeds.

This Article contains several safeguards to protect debtors against inadvertently encumbering deposit accounts and to reduce the likelihood that a secured party will realize a windfall from a debtor's deposit accounts. For example, because "deposit account" is a separate type of collateral, a security agreement covering general intangibles will not adequately describe deposit accounts. Rather, a security agreement must reasonably identify the deposit accounts that are the subject of a security interest, e.g., by using the term "deposit accounts." See Section 9-108. To perfect a security interest in a deposit account as original collateral, a secured party (other than the bank with which the deposit account is maintained) must obtain "control" of the account either by obtaining the bank's authenticated agreement or by becoming the bank's customer with respect to the deposit account. See Sections 9-312(b)(1), 9-104. Either of these steps requires the debtor's consent.

This Article also contains new rules that determine which State's law governs perfection and priority of a security interest in a deposit account (Section 9-304), priority of conflicting security interests in and set-off rights against a deposit account (Sections

9-327, 9-340), the rights of transferees of funds from an encumbered deposit account (Section 9-332), the obligations of the bank (Section 9-341), enforcement of security inter-

ests in a deposit account (Section 9-607(c)), and the duty of a secured party to terminate control of a deposit account (Section 9-208(b)).

28-9-110. Security interests arising under chapter 2 or 12, title 28, Idaho code. — A security interest arising under section 28-2-401, 28-2-505, 28-2-711(3) or 28-12-508(5)[, Idaho Code,] is subject to this chapter. However, until the debtor obtains possession of the goods:

(1) The security interest is enforceable, even if section 28-9-203(b)(3)[, Idaho Code,] has not been satisfied;

(2) Filing is not required to perfect the security interest;

(3) The rights of the secured party after default by the debtor are governed by chapter 2 or 12, title 28, Idaho Code; and

(4) The security interest has priority over a conflicting security interest created by the debtor.

History.

I.C., § 28-9-110, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-110, which comprised 1967, ch. 161, § 9-110, p. 351; am. 1987, ch. 284, § 4, p. 596, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions in the introductory paragraph and in subsection (1) were added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

Description Sufficient.

Attorney's security interest in the promissory note automatically attached to any proceeds of the note, including any rights arising out of the note. The attorney identified specific proceeds in the security agreement, including any judgments arising out of a collec-

tion action. A party who seeks to limit the type of statutory proceeds to which its security interest attaches must state an intent to limit proceeds in the security agreement. *Karle v. Visser*, 141 Idaho 804, 118 P.3d 136 (2005).

OFFICIAL COMMENT

1. **Source.** Former Section 9-113.

2. **Background.** Former Section 9-113, from which this section derives, referred generally to security interests "arising solely under the Article on Sales (Article 2) or the Article on Leases (Article 2A)." Views differed as to the precise scope of that section. In contrast, Section 9-110 specifies the security interests to which it applies.

3. **Security Interests Under Articles 2 and 2A.** Section 2-505 explains how a seller of goods may reserve a security interest in them. Section 2-401 indicates that a reservation of title by the seller of goods, despite delivery to the buyer, is limited to reservation of a security interest. As did former Article 9, this Article governs a security interest arising

solely under one of those sections; however, until the buyer obtains possession of the goods, the security interest is enforceable even in the absence of a security agreement, filing is not necessary to perfect the security interest, and the seller-secured party's rights on the buyer's default are governed by Article 2.

Sections 2-711(3) and 2A-508(5) create a security interest in favor of a buyer or lessee in possession of goods that were rightfully rejected or as to which acceptance was justifiably revoked. As did former Article 9, this Article governs a security interest arising solely under one of those sections; however, until the seller or lessor obtains possession of the goods, the security interest is enforceable

even in the absence of a security agreement, filing is not necessary to perfect the security interest, and the secured party's (buyer's or lessee's) rights on the debtor's (seller's or lessor's) default are governed by Article 2 or 2A, as the case may be.

4. Priority. This section adds to former Section 9-113 a priority rule. Until the debtor obtains possession of the goods, a security interest arising under one of the specified sections of Article 2 or 2A has priority over conflicting security interests created by the debtor. Thus, a security interest arising under Section 2-401 or 2-505 has priority over a conflicting security interest in the buyer's after-acquired goods, even if the goods in question are inventory. Arguably, the same result would obtain under Section 9-322, but even if it would not, a purchase-money-like priority is appropriate. Similarly, a security interest under Section 2-711(3) or 2A-508(5) has priority over security interests claimed by the seller's or lessor's secured lender. This result is appropriate, inasmuch as the payments giving rise to the debt secured by the Article 2 or 2A security interest are likely to be included among the lender's proceeds.

Example: Seller owns equipment subject to a security interest created by Seller in favor of Lender. Buyer pays for the equip-

ment, accepts the goods, and then justifiably revokes acceptance. As long as Seller does not recover possession of the equipment, Buyer's security interest under Section 2-711(3) is senior to that of Lender.

In the event that a security interest referred to in this section conflicts with a security interest that is created by a person other than the debtor, Section 9-325 applies. Thus, if Lender's security interest in the example was created not by Seller but by the person from whom Seller acquired the goods, Section 9-325 would govern.

5. Relationship to Other Rights and Remedies Under Articles 2 and 2A. This Article does not specifically address the conflict between (i) a security interest created by a buyer or lessee and (ii) the seller's or lessor's right to withhold delivery under Section 2-702(1), 2-703(a), or 2A-525, the seller's or lessor's right to stop delivery under Section 2-705 or 2A-526, or the seller's right to reclaim under Section 2-507(2) or 2-702(2). These conflicts are governed by the first sentence of Section 2-403(1), under which the buyer's secured party obtains no greater rights in the goods than the buyer had or had power to convey, or Section 2A-307(1), under which creditors of the lessee take subject to the lease contract.

28-9-111. Applicability of bulk transfer laws. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised 1967, ch. 161, § 9-111, p. 351, was repealed by S.L. 1993, ch. 288, § 52, effective July 1, 1993.

Section 54 of S.L. 1993, ch. 288 read:

"Rights and obligations that arose under Chapter 6, Title 28, Idaho Code, and Section 28-9-111, Idaho Code, before their repeal remain valid and may be enforced as though those statutes had not been repealed."

28-9-112 — 28-9-116. Where collateral is not owned by debtor. Security interests arising under chapter on sales or under chapter on leases. Consignment. Investment property. Security interest arising in purchase or delivery of financial asset. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

The following sections were repealed by S.L. 2001, ch. 208, § 1:

28-9-112, which comprised 1967, ch. 161, § 9-112, p. 351.

28-9-113, which comprised 1967, ch. 161, § 28-9-113, p. 351; am. 1993, ch. 287, § 4, p. 977.

28-9-114, which comprised 28-9-114, as added by 1979, ch. 299, § 10, p. 781.

28-9-115, which comprised I.C., § 28-9-115, as added by 1995, ch. 272, § 6, p. 873.

28-9-116, which comprised I.C., § 28-9-116, as added by 1995, ch. 272, § 7, p. 873.

PART 2. EFFECTIVENESS OF SECURITY AGREEMENT — ATTACHMENT OF SECURITY
INTEREST — RIGHTS OF PARTIES TO SECURITY AGREEMENT

28-9-201. General effectiveness of security agreement. — (a) Except as otherwise provided in the uniform commercial code, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) A transaction subject to this chapter is subject to any applicable rule of law which establishes a different rule for consumers, to the Idaho credit code, chapters 41 through 49, title 28, Idaho Code, and any rules promulgated thereunder and to the Idaho credit union act, chapter 21, title 26, Idaho Code, and any rules promulgated thereunder.

(c) In case of conflict between this chapter and a rule of law, statute or rule described in subsection (b) of this section, the rule of law, statute or rule controls. Failure to comply with a statute or rule described in subsection (b) of this section has only the effect the statute or rule specifies.

(d) This chapter does not:

- (1) Validate any rate, charge, agreement or practice that violates a rule of law, statute or rule described in subsection (b) of this section; or
- (2) Extend the application of the rule of law, statute or rule to a transaction not otherwise subject to it.

History.

I.C., § 28-9-201, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-201, which comprised 1967, ch. 161, § 9-201, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

JUDICIAL DECISIONS

ANALYSIS

Assignment of contract rights.

Loss of security interest.

Assignment of Contract Rights.

Where nothing in assignment to bank of rights under contracts between grain broker and grain concern indicated that it covered future advances made by bank, grain concern was justified in relying on assignment language in determining whether to follow broker's request to discontinue issuing joint payment checks on subsequent contracts and grain concern's course of conduct in providing joint payment checks up until that point did not establish that assignment was intended to cover future advances nor indicate that grain dealer had notice of that fact, particularly as grain concern was not a party to the assignment. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

Loss of Security Interest.

Where the course of dealing between secured party and farmers clearly indicated the authorization to sell crops in which secured party held security interests and that secured party further authorized particular sale by the farmers to insolvent buyer, secured party lost its security interest in the collateral under the provisions of § 28-9-306(2), notwithstanding argument that it merely "conditionally" authorized the sale and that, since the condition, i.e., payment, failed, § 28-9-306(2) did not take effect, *Western Idaho Prod. Credit Ass'n v. Simplot Feed Lots, Inc.*, 106 Idaho 260, 678 P.2d 52 (1984).

RESEARCH REFERENCES

C.J.S. — 79 C.J.S., Secured Transactions,
§ 28 et seq.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-201, 9-203(4).

2. **Effectiveness of Security Agreement.** Subsection (a) provides that a security agreement is generally effective. With certain exceptions, a security agreement is effective between the debtor and secured party and is likewise effective against third parties. Note that “security agreement” is used here (and elsewhere in this Article) as it is defined in Section 9-102: “an agreement that creates or provides for a security interest.” It follows that subsection (a) does not provide that every term or provision contained in a record that contains a security agreement or that is so labeled is effective. Properly read, former Section 9-201 was to the same effect. Exceptions to the general rule of subsection (a) arise where there is an overriding provision in this Article or any other Article of the UCC. For

example, Section 9-317 subordinates unperfected security interests to lien creditors and certain buyers, and several provisions in Part 3 subordinate some security interests to other security interests and interests of purchasers.

3. **Law, Statutes, and Regulations Applicable to Certain Transactions.** Subsection (b) makes clear that certain transactions, although subject to this Article, also are subject to other applicable laws relating to consumers or specified in that subsection. Subsection (c) provides that the other law is controlling in the event of a conflict, and that a violation of other law does not ipso facto constitute a violation of this Article. Subsection (d) provides that this Article does not validate violations under or extend the application of the other applicable laws.

28-9-202. Title to collateral immaterial. — Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles or promissory notes, the provisions of this chapter with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.

History.

I.C., § 28-9-202, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-202, which comprised 1967,

ch. 161, § 9-202, p. 351, was repealed by S.L.
2001, ch. 208, § 1.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Brands.
Construction.

Brands.

Title or indicia of title, such as a brand on cattle, is immaterial in determining the rights of parties to a secured transaction because their rights are determined solely by the nature and priority of their security interest. *Whitworth v. Krueger*, 98 Idaho 65, 558 P.2d 1026 (1976).

Construction.

The U.C.C. has firmly rejected the concept of title as the dispositive factor in determining the rights and obligations of parties to personal property. *State v. Burris*, 101 Idaho 683, 619 P.2d 1136 (1980).

OFFICIAL COMMENT

1. **Source.** Former Section 9-202.

2. **Title Immaterial.** The rights and duties of parties to a secured transaction and affected third parties are provided in this Article without reference to the location of "title" to the collateral. For example, the characteristics of a security interest that secures the purchase price of goods are the same whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed title or a lien to the secured party.

3. **When Title Matters.**

a. **Under This Article.** This section explicitly acknowledges two circumstances in which the effect of certain Article 9 provisions turns on ownership (title). First, in some respects sales of accounts, chattel paper, payment intangibles, and promissory notes receive special treatment. See, e.g., Sections 9-207(a), 9-210(b), 9-615(e). Buyers of receivables under former Article 9 were treated specially, as well. See, e.g., former Section

9-502(2). Second, the remedies of a consignor under a true consignment and, for the most part, the remedies of a buyer of accounts, chattel paper, payment intangibles, or promissory notes are determined by other law and not by Part 6. See Section 9-601(g).

b. **Under Other Law.** This Article does not determine which line of interpretation (e.g., title theory or lien theory, retained title or conveyed title) should be followed in cases in which the applicability of another rule of law depends upon who has title. If, for example, a revenue law imposes a tax on the "legal" owner of goods or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this Article does not attempt to define whether the secured party is a "legal" owner or whether the transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determines the location and source of title for those purposes.

28-9-203. Attachment and enforceability of security interest — Proceeds — Supporting obligations — Formal requisites. — (a) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (1) Value has been given;
 - (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
 - (3) One (1) of the following conditions is met:
 - (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
 - (B) the collateral is not a certificated security and is in the possession of the secured party under section 28-9-313[, Idaho Code,] pursuant to the debtor's security agreement;
 - (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 28-8-301[, Idaho Code,] pursuant to the debtor's security agreement; or
 - (D) the collateral is deposit accounts, electronic chattel paper, investment property, letter of credit rights, or electronic documents, and the secured party has control under section 28-7-106, 28-9-104, 28-9-105, 28-9-106 or 28-9-107[, Idaho Code,] pursuant to the debtor's security agreement.
- (c) Subsection (b) of this section is subject to section 28-4-210[, Idaho

Code,] on the security interest of a collecting bank, section 28-5-120[, Idaho Code,] on the security interest of a letter of credit issuer or nominated person, section 28-9-110[, Idaho Code,] on a security interest arising under chapter 2 or 12, title 28[, Idaho Code], and section 28-9-206[, Idaho Code,] on security interests in investment property.

(d) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this chapter or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies subsection (b)(3) of this section with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by section 28-9-315[, Idaho Code,] and is also attachment of a security interest in a supporting obligation for the collateral.

(g) The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage or other lien.

(h) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

History.

I.C., § 28-9-203, as added by 2001, ch. 208, § 2, p. 704; am. 2004, ch. 42, § 22, p. 77.

STATUTORY NOTES

Prior Laws.

Former § 28-9-203, which comprised I.C., § 28-9-203, as added by 1979, ch. 299, § 12, p. 781; am. 1985, ch. 135, § 47, p. 329; am. 1993, ch. 288, § 53, p. 1019; am. 1995, ch. 272, § 8, p. 873, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions throughout the section were added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

ANALYSIS

Creation of security interest.
Valid secured interest.

Creation of Security Interest.

Attorney's security interest in the promissory note automatically attached to any proceeds of the note, including any rights arising out of the note. The security agreement did not limit the types of proceeds to which the attorney's security interest would attach, because the attorney identified specific proceeds in the security agreement. *Karle v. Visser*, 141 Idaho 804, 118 P.3d 136 (2005).

Valid Secured Interest.

In Chapter 7 proceedings, since there was no written loan agreement between the debtor and her creditor father, there was no perfected security interest which could be avoided by the bankruptcy trustee; thus, debtor was entitled to a \$3800 exemption

from proceeds of the sale of her vehicle. In re Seibold, 351 B.R. 741 (Bankr. D. Idaho 2006).

In adversary proceeding subsequent to closing of bankruptcy case, debtor was not entitled to declaration that creditor was not the lienholder on three vehicles. Though the certificates of title were ambiguous, the balance of the evidence established that the debtor intended the vehicles to be security for his debt to the creditor, as evidenced by three separate IOUs, and the perfected liens passed through bankruptcy unaffected by debtor's discharge. *Owen v. Lundstrom* (In re Owen), 349 B.R. 66 (Bankr. D. Idaho 2006).

Cited in: *State v. Bennett*, 150 Idaho 278, 246 P.3d 387 (2010).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Actual notice.
After-acquired property.
Constructive notice.
Conversion of property.
Creation of security interest.
Crops covered by mortgage.
Delivery of pledged property.
Estoppel.
Improper acknowledgments.
Mortgage to secure antecedent debt.
Necessity of affidavit.
Necessity of jurat.
Pledge of lease.
Possession by mortgagor.
Presumption of situs.
Prohibited agreements.
Refusal to return collateral.
Rights in collateral.
Third parties.
Trust receipts.
Unacknowledged mortgage.
Unrecorded mortgages.
Validity between parties.
Writing required.

Actual Notice.

Buyer with actual notice of seller's conditional sales contract with the seller could not claim title as a bona fide purchaser on the ground that the contract was not recorded. *Gordon v. Loer*, 57 Idaho 269, 65 P.2d 148 (1937).

After-Acquired Property.

Mortgage given upon chattels to be after-

ward acquired was valid and binding upon parties thereto and all others having notice of it. *Dover Lumber Co. v. Case*, 31 Idaho 276, 170 P. 108 (1918).

Constructive Notice.

A duly recorded mortgage was constructive notice to anyone who buys the mortgaged property. *United States v. White*, 143 F. Supp. 754 (D. Idaho 1956).

Conversion of Property.

Defendant, who purchased mortgaged property on a ranch located in Gem County, was liable for conversion of mortgaged property where mortgage was recorded in Gem County, but defendant only searched records of Payette County where defendant did business. *United States v. White*, 143 F. Supp. 754 (D. Idaho 1956).

Creation of Security Interest.

A security interest was created by two promissory notes, each containing the words "SECURITY: 1956 GMC bus," and by a certificate of title endorsed and delivered to defendant; the promissory notes and the certificate of title served to satisfy the requirement of displaying both a loan and the taking of security for the payment thereof. *Simplot v. Owens*, 119 Idaho 243, 805 P.2d 449 (1990).

No security interest attached where security agreement did not describe land upon which crops were growing or were to be grown and the financing statement did not contain language granting a security interest. *Kelley Bean Co. v. Victor*, 122 Idaho 395, 834 P.2d 912 (Ct. App. 1992).

Crops Covered by Mortgage.

Lien of mortgage follows grain after severance and removal and was valid against purchaser from mortgagor. *Adams v. Caldwell Milling & Elevator Co.*, 33 Idaho 677, 197 P. 723 (1921).

Where a chattel mortgage purported to cover crops grown upon certain described lands, and then provided "also all hay grown or now growing or to be grown, on all land owned, leased or controlled by mortgagor," this was sufficient to embrace crops on other land in the same county by the mortgagor, although the land was not described, but upon which the mortgagor raised hay. *Livestock Credit Corp. v. Corbett*, 53 Idaho 190, 22 P.2d 874 (1933).

Delivery of Pledged Property.

Lien of pledge was dependent upon possession and no pledge was valid until property pledged was delivered to pledgee or pledge holder. *Radke v. Liberty Ins. Co.*, 37 Idaho 436, 216 P. 1040 (1923).

Estoppel.

Where stranger to mortgage purchased mortgaged property and agreed that mortgage shall stand as security for purchase price, provisions of statute requiring mortgages to be in writing, had no application, and purchaser is estopped to deny validity of the agreement, although it was not executed in conformity with the statute. *Burke Land & Livestock Co. v. Wells, Fargo & Co.*, 7 Idaho 42, 60 P. 87 (1900).

Improper Acknowledgments.

Appellants' mortgages not having been properly acknowledged and not having been entitled to be filed for record, the result was the same as though they had never been filed at all, and the other creditors had acquired specific rights in the property by the assignments for benefit of creditors prior to the time of any valid filing. *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957).

Mortgage to Secure Antecedent Debt.

Holder of mortgage on personal property given to secure antecedent debt had superior lien over purchaser who failed to remove property from seller's premises. *Millick v. Stevens*, 44 Idaho 347, 257 P. 30 (1927).

Necessity of Affidavit.

Affidavit required by former statute was necessary only to sustain validity of mortgage as against creditors and purchasers and did not affect it as between mortgagor and mortgagee. *Marchand v. Ronaghan*, 9 Idaho 95, 72 P. 731 (1903).

Necessity of Jurat.

Jurat to affidavit of good faith accompanying chattel mortgage was essential to validity of mortgage against subsequent good faith encumbrances for value, and lack of it could not be supplied by oral evidence that mortgagor was sworn. *Grandview State Bank v. Torrance*, 38 Idaho 388, 221 P. 145 (1923).

Pledge of Lease.

Where a lease had been recorded as a chattel mortgage, a delivery of a copy thereof to a party having a second mortgage on a portion of the leased property constituted a sufficient delivery of the lease to amount to a valid pledge thereof. *Gem State Lumber Co. v. Galion Irrigated Land Co.*, 55 Idaho 314, 41 P.2d 620 (1935).

Possession by Mortgagor.

Consideration of statutes relating to chattel mortgages indicated that possession by the mortgagor or others, where the mortgage was authenticated and filed, was contemplated, and the lien preserved. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933).

Under common law, chattel mortgagee had both title and possession of mortgaged goods; but, under statute, mortgagee had no title but only lien on security. *Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 231, 266 P. 659 (1928).

Presumption of Situs.

Mortgaged property was presumed to be in the county on the date the mortgage was recorded. *United States v. White*, 143 F. Supp. 754 (D. Idaho 1956).

Prohibited Agreements.

Agreement to hold a mortgage for individual indebtedness when said mortgage has been included in a subsequent copartnership mortgage which had been satisfied is contrary to provisions of former law. *Willows v. Rosenstien*, 5 Idaho 305, 48 P. 1067 (1897).

Lien of mortgage could not be extended beyond its terms so as to secure a debt not named therein, or to hypothecate property not covered by the mortgage, except by a compliance with the provisions of statute requiring that a mortgage be in writing; but this did not preclude mortgagor from waiving statute of limitations as to mortgage debt by indorsing an acknowledgment to pay debt on note and mortgage. *Moulton v. Williams*, 6 Idaho 424, 55 P. 1019 (1899).

Parties to usurious contract secured by trust deed cannot remove usurious character of transaction by agreement between themselves and, thus, make trust deed a lien for interest and costs as against junior mortgagee, who was not a party to the agreement, and whose rights would be prejudiced thereby. *Madsen v. Whitman*, 8 Idaho 762, 71 P. 152 (1902).

Refusal to Return Collateral.

A cause of action for conversion is a remedy available to a pledgor against a secured party-pledgee who refuses to return the collateral, if a security agreement does not give a legal right to retain the collateral after a demand for return by the pledgor. If, at the time the pledgor makes the demand for the return of the collateral, the secured party has a contractual right to continue to retain the collateral, then secured party's refusal to return the collateral would not be an act of dominion wrongfully asserted; if, however, the pledgor makes a rightful and reasonable demand for return of the collateral, the pledgee must act reasonably in either returning the collateral or in refusing to do so. Reasonableness becomes an issue in conversion after demand and notice to pledgee and pertains, among other things, to the good faith of the pledgee in dealing with the collateral thereafter. *Luzar v. Western Sur. Co.*, 107 Idaho 693, 692 P.2d 337 (1984).

Rights in Collateral.

Where the debtor had possession of the pledged automobile, as one of the principals of the used car dealership, he had authority to buy and sell cars, and there was no prohibition against selling a car to himself or against pledging a car as collateral for a loan. The debtor had authority to deal with the property of the business, and such authority was sufficient to satisfy the requirement of "rights in the collateral"; therefore, the bank obtained from the debtor a valid security interest, enforceable "against the debtor or third par-

ties." *First Sec. Bank v. Woolf*, 111 Idaho 680, 726 P.2d 792 (Ct. App. 1986).

A debtor did not have rights in collateral crops until, at the earliest, its crops were planted. *Tri River Chem. Co. v. TNT Farms*, 226 Bankr. 436 (Bankr. D. Idaho 1998).

Third Parties.

The debtor's partner in a used car dealership was among the "third parties" bound by the bank's imperfect security interest in the car, where even if the partner had a purchase money security interest. It was not "perfected" at the time the debtor acquired the automobile because the partner never filed a financing statement, nor did he "perfect" any purported security interest by taking possession of the collateral until long after the purchase had occurred. *First Sec. Bank v. Woolf*, 111 Idaho 680, 726 P.2d 792 (Ct. App. 1986).

Trust Receipts.

The interest of the holder of a trust receipt on a car sold by the trustee to another dealer was a property interest, and not a lien and holder of trust receipt was entitled to claim proceeds of sale which were deposited in trustee's bank account and, subsequently attached by the sheriff for taxes due the federal government by the trustee. *Commercial Credit Corp. v. Bosse*, 76 Idaho 409, 283 P.2d 937 (1955).

Under the terms of former statute, the security interest of the entruster could be derived from the trustee or any other person. *Commercial Credit Corp. v. Bosse*, 76 Idaho 409, 283 P.2d 937 (1955).

Unacknowledged Mortgage.

Mortgage of personal property unacknowledged by husband and wife was valid against mortgagors and all persons not creditors of mortgagors or subsequent encumbrancers or purchasers of property in good faith and for value. *Nohrnberg v. Boley*, 42 Idaho 48, 246 P. 12 (1925).

Unrecorded Mortgages.

Agreement between mortgagor and mortgagee to withhold chattel mortgage from record was evidence of fraudulent intent. *In re Hickerson*, 162 F. 345 (D. Idaho 1908).

Where chattel mortgage was not filed for record as required by former statute, subsequent purchaser of property was not bound by mortgage unless he was shown to have actual notice of the same. *Cowden v. Finney*, 9 Idaho 619, 75 P. 765 (1904).

Purchaser at mortgage sale of property acquired by mortgagor subsequent to date of mortgage and mortgaged to another by unrecorded mortgage acquired no interest therein under former statute, making unrecorded mortgages void as to subsequent purchasers.

Stoddard v. Ploeger, 42 Idaho 688, 247 P. 791 (1926).

Validity Between Parties.

As between the parties, the chattel mortgages were enforceable and would be given full weight even though they were ineffective as to third persons because of lack of notice. *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957).

Writing Required.

Former statute requiring mortgages to be

in writing applied to all mortgages whether real or chattel. *Willows v. Rosenstien*, 5 Idaho 305, 48 P. 1067 (1899); *Keane v. Kibble*, 28 Idaho 274, 154 P. 972 (1915).

Document assigning moneys due or to become due under certain grain contracts satisfied the requirement of former similar section that there be a written security agreement. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

RESEARCH REFERENCES

Am. Jur. — 67A Am. Jur. 2d, Sales, § 932 et seq.

72 Am. Jur. 2d, Statute of Frauds, § 130.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-203, 9-115(2), (6).

2. **Creation, Attachment, and Enforceability.** Subsection (a) states the general rule that a security interest attaches to collateral only when it becomes enforceable against the debtor. Subsection (b) specifies the circumstances under which a security interest becomes enforceable. Subsection (b) states three basic prerequisites to the existence of a security interest: value (paragraph (1)), rights or power to transfer rights in collateral (paragraph (2)), and agreement plus satisfaction of an evidentiary requirement (paragraph (3)). When all of these elements exist, a security interest becomes enforceable between the parties and attaches under subsection (a). Subsection (c) identifies certain exceptions to the general rule of subsection (b).

3. **Security Agreement; Authentication.** Under subsection (b)(3), enforceability requires the debtor's security agreement and compliance with an evidentiary requirement in the nature of a Statute of Frauds. Paragraph (3)(A) represents the most basic of the evidentiary alternatives, under which the debtor must authenticate a security agreement that provides a description of the collateral. Under Section 9-102, a "security agreement" is "an agreement that creates or provides for a security interest." Neither that definition nor the requirement of paragraph (3)(A) rejects the deeply rooted doctrine that a bill of sale, although absolute in form, may be shown in fact to have been given as security. Under this Article, as under prior law, a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security. Similarly, a self-styled "lease" may serve as a security agreement if the agreement creates a security interest. See Section 1-203 (distinguishing security interest from lease).

4. **Possession, Delivery, or Control Pursuant to Security Agreement.** The other alternatives in subsection (b)(3) dispense with the requirement of an authenticated security agreement and provide alternative evidentiary tests. Under paragraph (3)(B), the secured party's possession substitutes for the debtor's authentication under paragraph (3)(A) if the secured party's possession is "pursuant to the debtor's security agreement." That phrase refers to the debtor's agreement to the secured party's possession for the purpose of creating a security interest. The phrase should not be confused with the phrase "debtor has authenticated a security agreement," used in paragraph (3)(A), which contemplates the debtor's authentication of a record. In the unlikely event that possession is obtained without the debtor's agreement, possession would not suffice as a substitute for an authenticated security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party's possession is maintained without the agreement of a subsequent debtor (e.g., a transferee). Possession as contemplated by Section 9-313 is possession for purposes of subsection (b)(3)(B), even though it may not constitute possession "pursuant to the debtor's agreement" and consequently might not serve as a substitute for an authenticated security agreement under subsection (b)(3)(A). Subsection (b)(3)(C) provides that delivery of a certificated security to the secured party under Section 8-301 pursuant to the debtor's security agreement is sufficient as a substitute for an authenticated security agreement. Similarly, under subsection (b)(3)(D), control of investment property, a deposit account, electronic chattel paper, a letter-of-credit right, or electronic documents satisfies the evidentiary test if control is pursuant to the debtor's security agreement.

5. Collateral Covered by Other Statute or Treaty. One evidentiary purpose of the formal requisites stated in subsection (b) is to minimize the possibility of future disputes as to the terms of a security agreement (e.g., as to the property that stands as collateral for the obligation secured). One should distinguish the evidentiary functions of the formal requisites of attachment and enforceability (such as the requirement that a security agreement contain a description of the collateral) from the more limited goals of “notice filing” for financing statements under Part 5, explained in Section 9-502, Comment 2. When perfection is achieved by compliance with the requirements of a statute or treaty described in Section 9-311(a), such as a federal recording act or a certificate-of-title statute, the manner of describing the collateral in a registry imposed by the statute or treaty may or may not be adequate for purposes of this section and Section 9-108. However, the description contained in the security agreement, not the description in a public registry or on a certificate of title, controls for purposes of this section.

6. Debtor's Rights; Debtor's Power to Transfer Rights. Subsection (b)(2) conditions attachment on the debtor's having “rights in the collateral or the power to transfer rights in the collateral to a secured party.” A debtor's limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. However, in accordance with basic personal property conveyancing principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be.

Certain exceptions to the baseline rule enable a debtor to transfer, and a security interest to attach to, greater rights than the debtor has. See Part 3, Subpart 3 (priority rules). The phrase, “or the power to transfer rights in the collateral to a secured party,” accommodates those exceptions. In some cases, a debtor may have power to transfer another person's rights only to a class of transferees that excludes secured parties. See, e.g., Section 2-403(2) (giving certain merchants power to transfer an entruster's rights to a buyer in ordinary course of business). Under those circumstances, the debtor would not have the power to create a security interest in the other person's rights, and the condition in subsection (b)(2) would not be satisfied.

7. New Debtors. Subsection (e) makes clear that the enforceability requirements of subsection (b)(3) are met when a new debtor becomes bound under an original debtor's

security agreement. If a new debtor becomes bound as debtor by a security agreement entered into by another person, the security agreement satisfies the requirement of subsection (b)(3) as to the existing and after-acquired property of the new debtor to the extent the property is described in the agreement.

Subsection (d) explains when a new debtor becomes bound. Persons who become bound under paragraph (2) are limited to those who both become primarily liable for the original debtor's obligations and succeed to (or acquire) its assets. Thus, the paragraph excludes sureties and other secondary obligors as well as persons who become obligated through veil piercing and other non-successorship doctrines. In many cases, paragraph (2) will exclude successors to the assets and liabilities of a division of a debtor. See also Section 9-508, Comment 3.

8. Supporting Obligations. Under subsection (f), a security interest in a “supporting obligation” (defined in Section 9-102) automatically follows from a security interest in the underlying, supported collateral. This result was implicit under former Article 9. Implicit in subsection (f) is the principle that the secured party's interest in a supporting obligation extends to the supporting obligation only to the extent that it supports the collateral in which the secured party has a security interest. Complex issues may arise, however, if a supporting obligation supports many separate obligations of a particular account debtor and if the supported obligations are separately assigned as security to several secured parties. The problems may be exacerbated if a supporting obligation is limited to an aggregate amount that is less than the aggregate amount of the obligations it supports. This Article does not contain provisions dealing with competing claims to a limited supporting obligation. As under former Article 9, the law of suretyship and the agreements of the parties will control.

9. Collateral Follows Right to Payment or Performance. Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien. See Restatement (3d), Property (Mortgages) § 5.4(a) (1997). See also Section 9-308(e) (analogous rule for perfection).

10. Investment Property. Subsections (h) and (i) make clear that attachment of a security interest in a securities account or commodity account is also attachment in security entitlements or commodity contracts carried in the accounts.

28-9-204. After-acquired property — Future advances. — (a) Except as otherwise provided in subsection (b) of this section, a security

agreement may create or provide for a security interest in after-acquired collateral.

(b) A security interest does not attach under a term constituting an after-acquired property clause to:

(1) Consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within ten (10) days after the secured party gives value; or

(2) A commercial tort claim.

(c) A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment.

History.

I.C., § 28-9-204, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-204, which comprised I.C.,
§ 28-9-204, as added by 1979, ch. 299, § 14,

p. 781, was repealed by S.L. 2001, ch. 208,
§ 1.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Accounts receivable.

After-acquired property.

After-raised crop.

Description sufficient.

Effect of mortgage.

Fraud.

Future advances.

Mortgagee to secure preexisting debt.

Mortgage on growing crops.

Proof of interest.

Security agreement.

Accounts Receivable.

Bank to which contractor had assigned accounts receivable did not waive rights under security agreement as to customer of contractor by failing to object when customer made several checks payable solely to the contractor, contrary to bank's request that checks be issued payable jointly to the bank and the contractor, where customer had received proper notice of the security agreement and assignment of accounts receivable and had in fact made the first and last check payable jointly. *Bank of Commerce v. Intermountain Gas Co.*, 96 Idaho 29, 523 P.2d 1375 (1974).

After-Acquired Property.

A chattel mortgage describing certain property and also providing that the mortgage

should cover property which the mortgagor "may hereafter acquire" included personal property acquired after execution of the mortgage. *Poage v. Cooperative Publishing Co.*, 57 Idaho 561, 66 P.2d 1119 (1937).

It was sufficient that the intention of the parties was that after-acquired property should be covered by a chattel mortgage and held as security for the debt, where such was manifest from language of the instrument. *Poage v. Cooperative Publishing Co.*, 57 Idaho 561, 66 P.2d 1119 (1937).

A security interest arising by virtue of an after-acquired property clause is no longer a disfavored arrangement; a security interest will attach in such collateral when value has been given and when the contract has been made. Nevertheless, to protect the interests of

debtors, creditors, purchasers and other interested persons, some definiteness and clarity must be imparted by the security agreement itself. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

After-Raised Crop.

Where a mortgage was dated November 28, 1930, it was sufficient to embrace a lien upon a crop of hay raised in 1931 where it provided "all hay grown or now growing or to be grown, on all land owned, leased or controlled by mortgagor during the life of the mortgage." *Livestock Credit Corp. v. Corbett*, 53 Idaho 190, 22 P.2d 874 (1933).

Description Sufficient.

Mortgaged property was sufficiently described if a stranger to the instrument would be able to locate and identify the same by inquiries suggested by the instrument itself. *McConnell v. Langdon*, 3 Idaho 157, 28 P. 403 (1891).

Chattel mortgage describing property as "1333 early spring lambs, branded O—" was sufficient as between parties to mortgage. *Hare v. Young*, 26 Idaho 691, 146 P. 107 (1915).

Effect of Mortgage.

If mortgage provided that mortgagee could take possession for breach of conditions of mortgage, then courts would have held that such breach of condition coupled with right to possession gave mortgagee such qualified ownership as would enable him to maintain action for conversion. *Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 231, 266 P. 659 (1928).

Fraud.

Evidence in the cited case held not to justify a judgment that the notes and mortgage were void for fraud in their execution. *West v. Prater*, 57 Idaho 583, 67 P.2d 273 (1937).

Future Advances.

Absent a clause in the security agreement which clearly covers future advances, such advances do not fall within the scope of the agreement. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

An assignment of "all moneys now due or to become due under certain contracts" held by grain concern was inadequate in providing security for future advances, since there was absolutely no mention in the assignment of future advances. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

Mortgagee to Secure Preexisting Debt.

A creditor who accepted a mortgage to secure a preexisting debt could not maintain the position that he was an innocent mortgagee for valuable consideration. *Livestock Credit Corp. v. Corbett*, 53 Idaho 190, 22 P.2d 874 (1933).

Mortgage on Growing Crops.

When mortgage on growing crops had been recorded, it was notice to all persons claiming to have acquired rights to crop subsequent to record. *Adams v. Caldwell Milling & Elevator Co.*, 33 Idaho 677, 197 P. 723 (1921).

Prior chattel mortgage on crops to be grown was valid, though given to a third party by lessee of premises on which crops were to be grown, after an agreement between him and lessor to cancel the existing lease, where later, with notice of such mortgage, permitted lessee to live on and cultivate premises and, thereafter, entered into a new lease of the premises to lessee. *Bank of Roberts v. Olaveson*, 38 Idaho 223, 221 P. 560 (1923).

Lien of chattel mortgage upon crop to be sown or grown would not attach to crops sown by others, except insofar as mortgagor had or retained interests in the crop. *Lords v. Lava Hot Springs State Bank*, 44 Idaho 316, 256 P. 761 (1927).

It must affirmatively appear that crops upon which lien was claimed because of crop mortgage were, in fact, sown by mortgagor or caused to be sown by him. *Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 231, 266 P. 659 (1928).

Lien of chattel mortgage did not attach until crop afterward sown, or caused to be sown by mortgagor, came into existence. *Albrethsen v. Clements*, 48 Idaho 80, 279 P. 1097 (1929).

Proof of Interest.

Although a security interest cannot attach until there is an agreement, the existence of an agreement creating a security interest does not require the use of the words "security interest" but may be based on the actions and conduct of the parties. *Barney v. Rigby Loan & Inv. Co.*, 344 F. Supp. 694 (D. Idaho 1972).

Security Agreement.

This section provides that obligations covered by a security agreement may include future advances or other value; the official comment to this section stresses that the security agreement must so provide. *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994).

OFFICIAL COMMENT

1. **Source.** Former Section 9-204.
2. **After-Acquired Property; Continu-**

ing General Lien. Subsection (a) makes clear that a security interest arising by virtue

of an after-acquired property clause is no less valid than a security interest in collateral in which the debtor has rights at the time value is given. A security interest in after-acquired property is not merely an “equitable” interest; no further action by the secured party—such as a supplemental agreement covering the new collateral—is required. This section adopts the principle of a “continuing general lien” or “floating lien.” It validates a security interest in the debtor’s existing and (upon acquisition) future assets, even though the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. See Section 9-205. Subsection (a), together with subsection (c), also validates “cross-collateral” clauses under which collateral acquired at any time secures advances whenever made.

3. After-Acquired Consumer Goods. Subsection (b)(1) makes ineffective an after-acquired property clause covering consumer goods (defined in Section 9-109), except as accessions (see Section 9-335), acquired more than 10 days after the secured party gives value. Subsection (b)(1) is unchanged in substance from the corresponding provision in former Section 9-204(2).

4. Commercial Tort Claims. Subsection (b)(2) provides that an after-acquired property clause in a security agreement does not reach future commercial tort claims. In order for a security interest in a tort claim to attach, the claim must be in existence when the security agreement is authenticated. In addition, the security agreement must describe the tort claim with greater specificity than simply “all tort claims.” See Section 9-108(e).

5. Future Advances; Obligations Secured. Under subsection (c) collateral may secure future as well as past or present advances if the security agreement so provides. This is in line with the policy of this Article toward security interests in after-acquired property under subsection (a). Indeed, the parties are free to agree that a security interest secures any obligation whatsoever. Determining the obligations secured by collateral is solely a matter of construing the parties’ agreement under applicable law. This Article rejects the holdings of cases decided under former Article 9 that applied other tests, such as whether a future advance or other subsequently incurred obligation was of the same or a similar type or class as earlier advances and obligations secured by the collateral.

6. Sales of Receivables. Subsections (a) and (c) expressly validate after-acquired property and future advance clauses not only when the transaction is for security purposes but also when the transaction is the sale of accounts, chattel paper, payment intangibles, or promissory notes. This result was implicit under former Article 9.

7. Financing Statements. The effect of after-acquired property and future advance clauses as components of a security agreement should not be confused with the requirements applicable to financing statements under this Article’s system of perfection by notice filing. The references to after-acquired property clauses and future advance clauses in this section are limited to security agreements. There is no need to refer to after-acquired property or future advances or other obligations secured in a financing statement. See Section 9-502, Comment 2.

28-9-205. Use or disposition of collateral permissible. — (a) A security interest is not invalid or fraudulent against creditors solely because:

- (1) The debtor has the right or ability to:
 - (A) use, commingle or dispose of all or part of the collateral, including returned or repossessed goods;
 - (B) collect, compromise, enforce or otherwise deal with collateral;
 - (C) accept the return of collateral or make repossessions; or
 - (D) use, commingle or dispose of proceeds; or
- (2) The secured party fails to require the debtor to account for proceeds or replace collateral.

(b) This section does not relax the requirements of possession if attachment, perfection or enforcement of a security interest depends upon possession of the collateral by the secured party.

History.

I.C., § 28-9-205, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-205, which comprised 1967, ch. 161, § 9-205, p. 351; am. 1979, ch. 299,

§ 15, p. 781, was repealed by S.L. 2001, ch. 208, § 1.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

Right of Mortgagee to Sell.

While mortgage on a stock of goods which permitted mortgagor to remain in the full and free use and enjoyment of the same was void in that it permitted him to sell the goods in the usual course of trade, yet such a mortgage was valid when it covered wood corded and

standing in forest where it had been cut. *Meyer v. Munro*, 9 Idaho 46, 71 P. 969 (1903).

Mortgage upon stock of goods remaining in hands of mortgagor with power to dispose of the same was void as to third parties. In re *Hickerson*, 162 F. 345 (D. Idaho 1908).

OFFICIAL COMMENT

1. **Source.** Former Section 9-205.

2. **Validity of Unrestricted "Floating Lien."** This Article expressly validates the "floating lien" on shifting collateral. See Sections 9-201, 9-204 and Comment 2. This section provides that a security interest is not invalid or fraudulent by reason of the debtor's liberty to dispose of the collateral without being required to account to the secured party for proceeds or substitute new collateral. As did former Section 9-205, this section repeals the rule of *Benedict v. Ratner*, 268 U.S. 353 (1925), and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over collateral. The *Benedict* rule did not effectively discourage or eliminate security transactions in inventory and receivables. Instead, it forced financing arrangements to be self-liquidating. Although this section repeals *Benedict*, the filing and other perfection requirements (see Part 3, Subpart 2, and Part 5) provide for public notice that overcomes any potential misleading effects of a debtor's use and control of collateral. Moreover, nothing in this section prevents the debtor and secured party from agreeing to

procedures by which the secured party polices or monitors collateral or to restrictions on the debtor's dominion. However, this Article leaves these matters to agreement based on business considerations, not on legal requirements.

3. **Possessory Security Interests.** Subsection (b) makes clear that this section does not relax the requirements for perfection by possession under Section 9-313. If a secured party allows the debtor access to and control over collateral its security interest may be or become unperfected.

4. **Permissible Freedom for Debtor to Enforce Collateral.** Former Section 9-205 referred to a debtor's "liberty . . . to collect or compromise accounts or chattel paper." This section recognizes the broader rights of a debtor to "enforce," as well as to "collect" and "compromise" collateral. This section's reference to collecting, compromising, and enforcing "collateral" instead of "accounts or chattel paper" contemplates the many other types of collateral that a debtor may wish to "collect, compromise, or enforce": e.g., deposit accounts, documents, general intangibles, instruments, investment property, and letter-of-credit rights.

28-9-206. Security interest arising in purchase or delivery of financial asset. — (a) A security interest in favor of a securities intermediary attaches to a person's security entitlement if:

- (1) The person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and
- (2) The securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(b) The security interest described in subsection (a) of this section secures the person's obligation to pay for the financial asset.

(c) A security interest in favor of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if:

(1) The security or other financial asset:

(A) in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment; and

(B) is delivered under an agreement between persons in the business of dealing with such securities or financial assets; and

(2) The agreement calls for delivery against payment.

(d) The security interest described in subsection (c) of this section secures the obligation to make payment for the delivery.

History.

I.C., § 28-9-206, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-206, which comprised 1967,

ch. 161, § 9-206, p. 351, was repealed by S.L.
2001, ch. 208, § 1.

OFFICIAL COMMENT

1. **Source.** Former 9-116.

2. **Codification of "Broker's Lien."** Depending upon a securities intermediary's arrangements with its entitlement holders, the securities intermediary may treat the entitlement holder as entitled to financial assets before the entitlement holder has actually made payment for them. For example, many brokers permit retail customers to pay for financial assets by check. The broker may not receive final payment of the check until several days after the broker has credited the customer's securities account for the financial assets. Thus, the customer will have acquired a security entitlement prior to payment. Subsection (a) provides that, in such circumstances, the securities intermediary has a security interest in the entitlement holder's security entitlement. Under subsection (b) the security interest secures the customer's obligation to pay for the financial asset in question. Subsections (a) and (b) codify and adapt to the indirect holding system the so-called "broker's lien," which has long been recognized. See Restatement, Security § 12.

3. **Financial Assets Delivered Against Payment.** Subsection (c) creates a security interest in favor of persons who deliver certificated securities or other financial assets in physical form, such as money market instruments, if the agreed payment is not received. In some arrangements for settlement of transactions in physical financial assets, the seller's securities custodian will deliver physical certificates to the buyer's securities custodian and receive a time-stamped delivery

receipt. The buyer's securities custodian will examine the certificate to ensure that it is in good order, and that the delivery matches a trade in which the buyer has instructed the seller to deliver to that custodian. If all is in order, the receiving custodian will settle with the delivering custodian through whatever funds settlement system has been agreed upon or is used by custom and usage in that market. The understanding of the trade, however, is that the delivery is conditioned upon payment, so that if payment is not made for any reason, the security will be returned to the deliverer. Subsection (c) clarifies the rights of persons making deliveries in such circumstances. It provides the person making delivery with a security interest in the securities or other financial assets; under subsection (d), the security interest secures the seller's right to receive payment for the delivery. Section 8-301 specifies when delivery of a certificated security occurs; that section should be applied as well to other financial assets as well for purposes of this section.

4. **Automatic Attachment and Perfection.** Subsections (a) and (c) refer to attachment of a security interest. Attachment under this section has the same incidents (enforceability, right to proceeds, etc.) as attachment under Section 9-203. This section overrides the general attachment rules in Section 9-203. See Section 9-203(c). A securities intermediary's security interest under subsection (a) is perfected by control without further action. See Section 8-106 (control); 9-314 (perfection). Security interests arising under sub-

section (c) are automatically perfected. See Section 9-309(9).

28-9-207. Rights and duties of secured party having possession or control of collateral. — (a) Except as otherwise provided in subsection (d) of this section, a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) Except as otherwise provided in subsection (d) of this section, if a secured party has possession of collateral:

- (1) Reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;
- (2) The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;
- (3) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and
- (4) The secured party may use or operate the collateral:
 - (A) for the purpose of preserving the collateral or its value;
 - (B) as permitted by an order of a court having competent jurisdiction; or
 - (C) except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) Except as otherwise provided in subsection (d) of this section, a secured party having possession of collateral or control of collateral under section 28-7-106, 28-9-104, 28-9-105, 28-9-106 or 28-9-107[, Idaho Code]:

- (1) May hold as additional security any proceeds, except money or funds, received from the collateral;
- (2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and
- (3) May create a security interest in the collateral.

(d) If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

- (1) Subsection (a) of this section does not apply unless the secured party is entitled under an agreement:
 - (A) to charge back uncollected collateral; or
 - (B) otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and
- (2) Subsections (b) and (c) of this section do not apply.

History.

I.C., § 28-9-207, as added by 2001, ch. 208,
§ 2, p. 704; am. 2004, ch. 42, § 23, p. 77.

STATUTORY NOTES

Prior Laws.

Former § 28-9-207, which comprised 1967, ch. 161, § 9-207, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

introductory paragraph in subsection (c) was added by the compiler to conform to the statutory citation style.

Compiler's Notes.

The bracketed insertion at the end of the

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

Pledge of Stock.

Holder of stock as pledgee, having also a mortgage on land for improvement and benefit of which the pledged stock was used in the beginning and was used at time mortgage and

pledge were taken, might, while debt remains unpaid, control the stock and its benefits. *Feltham v. Sunnyside Pipe Line Co.*, 50 Idaho 349, 295 P. 1112 (1931).

RESEARCH REFERENCES

Am. Jur. — 11 Am. Jur. 2d, Bills and Notes, § 390 et seq.

OFFICIAL COMMENT

1. **Source.** Former Section 9-207.

2. **Duty of Care for Collateral in Secured Party's Possession.** Like former section 9-207, subsection (a) imposes a duty of care, similar to that imposed on a pledgee at common law, on a secured party in possession of collateral. See Restatement, Security §§ 17, 18. In many cases a secured party in possession of collateral may satisfy this duty by notifying the debtor of action that should be taken and allowing the debtor to take the action itself. If the secured party itself takes action, its reasonable expenses may be added to the secured obligation. The revised definitions of "collateral," "debtor," and "secured party" in Section 9-102 make this section applicable to collateral subject to an agricultural lien if the collateral is in the lienholder's possession. Under Section 1-302 the duty to exercise reasonable care may not be disclaimed by agreement, although under that section the parties remain free to determine by agreement standards that are not manifestly unreasonable as to what constitutes reasonable care. Unless otherwise agreed, for a secured party in possession of chattel paper or an instrument, reasonable care includes the preservation of rights against prior parties. The secured party's right to have instruments or documents indorsed or transferred to it or its order is dealt with in the relevant sections of Articles 3, 7, and 8. See Sections 3-203(c), 7-506, 8-304(d).

3. **Specific Rules When Secured Party in Possession or Control of Collateral.**

Subsections (b) and (c) provide rules following common-law precedents which apply unless the parties otherwise agree. The rules in subsection (b) apply to typical issues that may arise while a secured party is in possession of collateral, including expenses, insurance, and taxes, risk of loss or damage, identifiable and fungible collateral, and use or operation of collateral. Subsection (c) contains rules that apply in certain circumstances that may arise when a secured party is in either possession or control of collateral. These circumstances include the secured party's receiving proceeds from the collateral and the secured party's creation of a security interest in the collateral.

4. **Applicability Following Default.** This section applies when the secured party has possession of collateral either before or after default. See Sections 9-601(b), 9-609. Subsection (b)(4)(C) limits agreements concerning the use or operation of collateral to collateral other than consumer goods. Under Section 9-602(1), a debtor cannot waive or vary that limitation.

5. **"Repledges" and Right of Redemption.** Subsection (c)(3) eliminates the qualification in former Section 9-207 to the effect that the terms of a "repledge" may not "impair" a debtor's "right to redeem" collateral. The change is primarily for clarification. There is no basis on which to draw from subsection (c)(3) any inference concerning the debtor's right to redeem the collateral. The

debtor enjoys that right under Section 9-623; this section need not address it. For example, if the collateral is a negotiable note that the secured party (SP-1) repledges to SP-2, nothing in this section suggests that the debtor (D) does not retain the right to redeem the note upon payment to SP-1 of all obligations secured by the note. But, as explained below, the debtor's unimpaired right to redeem as against the debtor's original secured party nevertheless may not be enforceable as against the new secured party.

In resolving questions that arise from the creation of a security interest by SP-1, one must take care to distinguish D's rights against SP-1 from D's rights against SP-2. Once D discharges the secured obligation, D becomes entitled to the note; SP-1 has no legal basis upon which to withhold it. If, as a practical matter, SP-1 is unable to return the note because SP-2 holds it as collateral for SP-1's unpaid debt, then SP-1 is liable to D under the law of conversion.

Whether SP-2 would be liable to D depends on the relative priority of SP-2's security interest and D's interest. By permitting SP-1 to create a security interest in the collateral (repledge), subsection (c)(3) provides a statutory power for SP-1 to give SP-2 a security interest (subject, of course, to any agreement by SP-1 not to give a security interest). In the vast majority of cases where repledge rights are significant, the security interest of the second secured party, SP-2 in the example, will be senior to the debtor's interest. By virtue of the debtor's consent or applicable legal rules, SP-2 typically would cut off D's rights in investment property or be immune from D's claims. See Sections 9-331, 3-306 (holder in due course), 8-303 (protected purchaser), 8-502 (acquisition of a security entitlement), 8-503(e) (action by entitlement holder). Moreover, the expectations and business practices in some markets, such as the securities markets, are such that D's consent to SP-2's taking free of D's rights inheres in D's creation of SP-1's security interest which gives rise to SP-1's power under this section. In these situations, D would have no right to recover the collateral or recover damages from SP-2. Nevertheless, D would have a damage claim against SP-1 if SP-1 had given a security interest to SP-2 in breach of its agreement with D. Moreover, if SP-2's security interest secures an amount that is less than the amount secured by SP-1's security interest (granted by D), then D's exercise of its right to redeem would provide value sufficient to discharge SP-1's obligations to SP-2.

For the most part this section does not change the law under former Section 9-207, although eliminating the reference to the debtor's right of redemption may alter the secured party's right to repledge in one re-

spect. Former Section 9-207 could have been read to limit the secured party's statutory right to repledge collateral to repledge transactions in which the collateral did not secure a greater obligation than that of the original debtor. Inasmuch as this is a matter normally dealt with by agreement between the debtor and secured party, any change would appear to have little practical effect.

6. "Repledges" of Investment Property. The following example will aid the discussion of "repledges" of investment property.

Example. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha does not have an account with Able. Alpha uses Beta Bank as its securities custodian. Debtor instructs Able to transfer the shares to Beta, for the account of Alpha, and Able does so. Beta then credits Alpha's account. Alpha has control of the security entitlement for the 1000 shares under Section 8-106(d). (These are the facts of Example 2, Section 8-106, Comment 4.) Although, as between Debtor and Alpha, Debtor may have become the beneficial owner of the new securities entitlement with Beta, Beta has agreed to act on Alpha's entitlement orders because, as between Beta and Alpha, Alpha has become the entitlement holder.

Next, Alpha grants Gamma Bank a security interest in the security entitlement with Beta that includes the 1000 shares of XYZ Co. stock. In order to afford Gamma control of the entitlement, Alpha instructs Beta to transfer the stock to Gamma's custodian, Delta Bank, which credits Gamma's account for 1000 shares. At this point Gamma holds its securities entitlement for its benefit as well as that of its debtor, Alpha. Alpha's derivative rights also are for the benefit of Debtor.

In many, probably most, situations and at any particular point in time, it will be impossible for Debtor or Alpha to "trace" Alpha's "repledge" to any particular securities entitlement or financial asset of Gamma or anyone else. Debtor would retain, of course, a right to redeem the collateral from Alpha upon satisfaction of the secured obligation. However, in the absence of a traceable interest, Debtor would retain only a personal claim against Alpha in the event Alpha failed to restore the security entitlement to Debtor. Moreover, even in the unlikely event that Debtor could trace a property interest, in the context of the financial markets, normally the operation of this section, Debtor's explicit agreement to permit Alpha to create a senior security interest, or legal rules permitting Gamma to cut off Debtor's rights or become immune from Debtor's claims would effectively subordinate Debtor's interest to the holder of a security interest created by Alpha. And, under the

shelter principle, all subsequent transferees would obtain interests to which Debtor's interest also would be subordinate.

7. Buyers of Chattel Paper and Other Receivables; Consignors. This section has been revised to reflect the fact that a seller of accounts, chattel paper, payment intangibles, or promissory notes retains no interest in the collateral and so is not disadvantaged by the secured party's noncompliance with the requirements of this section. Accordingly, subsection (d) provides that subsection (a) applies only to security interests that secure an obligation and to sales of receivables in which the buyer has recourse against the debtor. (Of course, a buyer of accounts or payment intangibles could not have "possession" of original

collateral, but might have possession of proceeds, such as promissory notes or checks.) The meaning of "recourse" in this respect is limited to recourse arising out of the account debtor's failure to pay or other default.

Subsection (d) makes subsections (b) and (c) inapplicable to buyers of accounts, chattel paper, payment intangibles, or promissory notes and consignors. Of course, there is no reason to believe that a buyer of receivables or a consignor could not, for example, create a security interest or otherwise transfer an interest in the collateral, regardless of who has possession of the collateral. However, this section leaves the rights of those owners to law other than Article 9.

28-9-208. Additional duties of secured party having control of collateral. — (a) This section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within ten (10) days after receiving an authenticated demand by the debtor:

(1) A secured party having control of a deposit account under section 28-9-104(a)(2)[, Idaho Code,] shall send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party;

(2) A secured party having control of a deposit account under section 28-9-104(a)(3)[, Idaho Code,] shall:

(A) pay the debtor the balance on deposit in the deposit account; or

(B) transfer the balance on deposit into a deposit account in the debtor's name;

(3) A secured party, other than a buyer, having control of electronic chattel paper under section 28-9-105[, Idaho Code,] shall:

(A) communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

(B) if the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;

(4) A secured party having control of investment property under section 28-8-106(4)(b) or 28-9-106(b)[, Idaho Code,] shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that

releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party; and

(5) A secured party having control of a letter of credit right under section 28-9-107[, Idaho Code,] shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party.

(6) A secured party having control of an electronic document shall:

(A) Give control of the electronic document to the debtor or its designated custodian;

(B) If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party.

History.

I.C., § 28-9-208, as added by 2001, ch. 208, § 2, p. 704; am. 2004, ch. 42, § 24, p. 77.

STATUTORY NOTES

Prior Laws.

Former § 28-9-208, which comprised 1967, ch. 161, § 9-208, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions throughout subsection (b) were added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. Source. New.

2. **Scope and Purpose.** This section imposes duties on a secured party who has control of a deposit account, electronic chattel paper, investment property, or a letter-of-credit right. The duty to terminate the secured party's control is analogous to the duty to file a termination statement, imposed by Section 9-513. Under subsection (a), it applies only when there is no outstanding secured obligation and the secured party is not committed to give value. The requirements of this section can be varied by agreement under Section 1-102(3). For example, a debtor could by contract agree that the secured party may comply with subsection (b) by releasing control more than 10 days after demand. Also, duties under this section should not be read to conflict with the terms of the collateral itself.

For example, if the collateral is a time deposit account, subsection (b)(2) should not require a secured party with control to make an early withdrawal of the funds (assuming that were possible) in order to pay them over to the debtor or put them in an account in the debtor's name.

3. **Remedy for Failure to Relinquish Control.** If a secured party fails to comply with the requirements of subsection (b), the debtor has the remedy set forth in Section 9-625(e). This remedy is identical to that applicable to failure to provide or file a termination statement under Section 9-513.

4. **Duty to Relinquish Possession.** Although Section 9-207 addresses directly the duties of a secured party in possession of collateral, that section does not require the secured party to relinquish possession when

the secured party ceases to hold a security interest. Under common law, absent agreement to the contrary, the failure to relinquish possession of collateral upon satisfaction of the secured obligation would constitute a conversion. Inasmuch as problems apparently

have not surfaced in the absence of statutory duties under former Article 9 and the common-law duty appears to have been sufficient, this Article does not impose a statutory duty to relinquish possession.

28-9-209. Duties of secured party if account debtor has been notified of assignment. — (a) Except as otherwise provided in subsection (c), this section applies if:

- (1) There is no outstanding secured obligation; and
- (2) The secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within ten (10) days after receiving an authenticated demand by the debtor, a secured party shall send to an account debtor that has received notification of an assignment to the secured party as assignee under section 28-9-406(a)[, Idaho Code,] an authenticated record that releases the account debtor from any further obligation to the secured party.

(c) This section does not apply to an assignment constituting the sale of an account, chattel paper or payment intangible.

History.

I.C., § 28-9-209, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion near the end of subsection (b) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New.

2. **Scope and Purpose.** Like Sections 9-208 and 9-513, which require a secured party to relinquish control of collateral and to file or provide a termination statement for a financing statement, this section requires a secured party to free up collateral when there no longer is any outstanding secured obligation or any commitment to give value in the future. This section addresses the case in

which account debtors have been notified to pay a secured party to whom the receivables have been assigned. It requires the secured party (assignee) to inform the account debtors that they no longer are obligated to make payment to the secured party. See subsection (b). It does not apply to account debtors whose obligations on an account, chattel paper, or payment intangible have been sold. See subsection (c).

28-9-210. Request for accounting — Request regarding list of collateral or statement of account. — (a) In this section:

- (1) "Request" means a record of a type described in paragraph (2), (3) or (4) of this subsection.
- (2) "Request for an accounting" means a record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request.
- (3) "Request regarding a list of collateral" means a record authenticated

by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request.

(4) "Request regarding a statement of account" means a record authenticated by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request.

(b) Subject to subsections (c), (d), (e) and (f) of this section, a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within fourteen (14) days after receipt:

(1) In the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and

(2) In the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.

(c) A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor an authenticated record including a statement to that effect within fourteen (14) days after receipt.

(d) A person that receives a request regarding a list of collateral, claims no interest in the collateral when it receives the request, and claimed an interest in the collateral at an earlier time shall comply with the request within fourteen (14) days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the collateral; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the collateral.

(e) A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and claimed an interest in the obligations at an earlier time shall comply with the request within fourteen (14) days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the obligations; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) A debtor is entitled without charge to one (1) response to a request under this section during any six (6) month period. The secured party may require payment of a charge not exceeding twenty-five dollars (\$25.00) for each additional response.

History.

I.C., § 28-9-210, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-208.

2. **Scope and Purpose.** This section provides a procedure whereby a debtor may obtain from a secured party information about the secured obligation and the collateral in which the secured party may claim a security interest. It clarifies and resolves some of the issues that arose under former Section 9-208 and makes information concerning the secured indebtedness readily available to debtors, both before and after default. It applies to agricultural lien transactions (see the definitions of “debtor,” “secured party,” and “collateral” in Section 9-102), but generally not to sales of receivables. See subsection (b).

3. **Requests by Debtors Only.** A financing statement filed under Part 5 may disclose only that a secured party may have a security interest in specified types of collateral. In most cases the financing statement will contain no indication of the obligation (if any) secured, whether any security interest actually exists, or the particular property subject to a security interest. Because creditors of and prospective purchasers from a debtor may have legitimate needs for more detailed information, it is necessary to provide a procedure under which the secured party will be required to provide information. On the other hand, the secured party should not be under a duty to disclose any details of the debtor’s financial affairs to any casual inquirer or competitor who may inquire. For this reason, this section gives the right to request information to the debtor only. The debtor may submit a request in connection with negotiations with subsequent creditors and purchasers, as well as for the purpose of determining the status of its credit relationship or demonstrating which of its assets are free of a security interest.

4. **Permitted Types of Requests for Information.** Subsection (a) contemplates that a debtor may request three types of informa-

tion by submitting three types of “requests” to the secured party. First, the debtor may request the secured party to prepare and send an “accounting” (defined in Section 9-102). Second, the debtor may submit to the secured party a list of collateral for the secured party’s approval or correction. Third, the debtor may submit to the secured party for its approval or correction a statement of the aggregate amount of unpaid secured obligations. Inasmuch as a secured party may have numerous transactions and relationships with a debtor, each request must identify the relevant transactions or relationships. Subsections (b) and (c) require the secured party to respond to a request within 14 days following receipt of the request.

5. **Recipients Claiming No Interest in the Transaction.** A debtor may be unaware that a creditor with whom it has dealt has assigned its security interest or the secured obligation. Subsections (d) and (e) impose upon recipients of requests under this section the duty to inform the debtor that they claim no interest in the collateral or secured obligation, respectively, and to inform the debtor of the name and mailing address of any known assignee or successor. As under subsections (b) and (c), a response to a request under subsection (d) or (e) is due 14 days following receipt.

6. **Waiver; Remedy for Failure to Comply.** The debtor’s rights under this section may not be waived or varied. See Section 9-602(2). Section 9-625 sets forth the remedies for noncompliance with the requirements of this section.

7. **Limitation on Free Responses to Requests.** Under subsection (f), during a six-month period a debtor is entitled to receive from the secured party one free response to a request. The debtor is not entitled to a free response to each type of request (i.e., three free responses) during a six-month period.

PART 3. PERFECTION AND PRIORITY

28-9-301. Law governing perfection and priority of security interests. — Except as otherwise provided in sections 28-9-303 through 28-9-306[, Idaho Code], the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located

in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in subsection (4) of this section, while tangible negotiable documents, goods, instruments, money or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

- (A) Perfection of a security interest in the goods by filing a fixture filing;
- (B) Perfection of a security interest in timber to be cut; and
- (C) The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.

History.

I.C., § 28-9-301, as added by 2001, ch. 208, § 2, p. 704; am. 2004, ch. 42, § 25, p. 77.

STATUTORY NOTES

Prior Laws.

Former § 28-9-301, which comprised 1967, ch. 161, § 9-301, p. 351; am. 1979, ch. 299, § 16, p. 781; am. 1989, ch. 183, § 1, p. 458; am. 1995, ch. 272, § 9, p. 873, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertion in the introductory paragraph was added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Actual notice.

After-acquired property.

Applicable law.

Constructive notice.

Conversion of property.

Failure to reperfect.

Lack of knowledge of unperfected interest.

Removal of goods from other jurisdiction.

Unperfected interest.

Unrecorded mortgage.

Actual Notice.

Buyer with actual notice of seller's conditional sales contract with the seller cannot claim title as a bona fide purchaser on ground that the contract was not recorded. *Gordon v. Loer*, 57 Idaho 269, 65 P.2d 148 (1937).

After-Acquired Property.

Mortgage given upon chattels to be afterward acquired was valid and binding upon

parties thereto and all others having notice of it. *Dover Lumber Co. v. Case*, 31 Idaho 276, 170 P. 108 (1918).

Applicable law.

In a dispute over whether a vehicle transaction was a true lease or disguised security interest, Idaho law applied because under a security agreement, certificate of title of the

vehicle was issued in Idaho and under this section, Idaho law would apply. In re Bumgardner, 183 Bankr. 224 (Bankr. D. Idaho 1995).

Constructive Notice.

A duly recorded mortgage was constructive notice to anyone who bought the mortgaged property. *United States v. White*, 143 F. Supp. 754 (D. Idaho 1956).

Purchaser of potatoes subject to crop mortgage who refused to surrender potatoes after demand by mortgagee thereby became charged with constructive notice of mortgage. *Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 231, 266 P. 659 (1928).

Conversion of Property.

Defendant, who purchased mortgaged property on a ranch located in Gem County, was liable for conversion of mortgaged property where mortgage was recorded in Gem County, but defendant only searched records in Payette County where defendant did business. *United States v. White*, 143 F. Supp. 754 (D. Idaho 1956).

Failure to Reperfect.

Failure to reperfect within four months carries two distinct consequences. First, the security interest becomes unperfected in the future as against the claims of all other secured creditors, regardless of whether they are "purchasers" and remains unperfected until reperfecton occurs. Second, the security interest also is deemed to have been unperfected as against the claims of "purchasers" during the elapsed four-month period. *Rockwell Int'l Credit Corp. v. Valley Bank*, 109 Idaho 406, 707 P.2d 517 (Ct. App. 1985).

Lack of Knowledge of Unperfected Interest.

The mere fact that the purchaser knew, when he purchased the farm disc that consignment exchange owed the seller \$3,000 for the disc was not equivalent to knowledge that the seller had retained a security interest; therefore, the buyer acquired the farm disc with priority over the seller's unperfected security interest. *Seitz v. Stecklein*, 111 Idaho 364, 723 P.2d 908 (Ct. App. 1986).

Removal of Goods from Other Jurisdiction.

With regard to boat and motor originally purchased in Nevada, registration of the boat in Idaho did not defeat finance company's security interest in the boat and motor where said security interest was perfected in Nevada. In re Aguiar, 116 Bankr. 223 (Bankr. D. Idaho 1990).

Unperfected Interest.

The debtor's partner in a used car dealership was among the "third parties" bound by the bank's unperfected security interest in the car, where even if the partner had a purchase money security interest, it was not "perfected" at the time the debtor acquired the automobile because the partner never filed a financing statement, nor did he "perfect" any purported security interest by taking possession of the collateral until long after the purchase had occurred. *First Sec. Bank v. Woolf*, 111 Idaho 680, 726 P.2d 792 (Ct. App. 1986).

Unrecorded Mortgage.

Where chattel mortgage was not filed of record, subsequent purchaser of property was not bound by mortgage unless he was shown to have had actual notice of the same. *Cowden v. Finney*, 9 Idaho 619, 75 P. 765 (1904).

RESEARCH REFERENCES

Am. Jur. — 15A Am. Jur. 2d, Commercial Code, § 75 et seq.

C.J.S. — 79 C.J.S., Secured Transactions, § 104 et seq.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-103(1)(a), (b), 9-103(3)(a), (b), 9-103(5), substantially modified.

2. **Scope of This Subpart.** Part 3, Subpart 1 (Sections 9-301 through 9-307) contains choice-of-law rules similar to those of former Section 9-103. Former Section 9-103 generally addresses which State's law governs "perfection and the effect of perfection or non-perfection of" security interests. See, e.g., former Section 9-103(1)(b). This Article follows the broader and more precise formulation in former Section 9-103(6)(b), which was revised in connection with the promulgation of Revised Article 8 in 1994: "perfection, the

effect of perfection or non-perfection, and the priority of" security interests. Priority, in this context, subsumes all of the rules in Part 3, including "cut off" or "take free" rules such as Sections 9-317(b), (c), and (d), 9-320(a), (b), and (d), and 9-332. This subpart does not address choice of law for other purposes. For example, the law applicable to issues such as attachment, validity, characterization (e.g., true lease or security interest), and enforcement is governed by the rules in Section 1-301; that governing law typically is specified in the same agreement that contains the security agreement. And, another jurisdiction's law may govern other third-party mat-

ters addressed in this Article. See Section 9-401, Comment 3.

3. Scope of Referral. In designating the jurisdiction whose law governs, this Article directs the court to apply only the substantive (“local”) law of a particular jurisdiction and not its choice-of-law rules.

Example 1: Litigation over the priority of a security interest in accounts arises in State X. State X has adopted the official text of this Article, which provides that priority is determined by the local law of the jurisdiction in which the debtor is located. See Section 9-301(1). The debtor is located in State Y. Even if State Y has retained former Article 9 or enacted a nonuniform choice-of-law rule (e.g., one that provides that perfection is governed by the law of State Z), a State X court should look only to the substantive law of State Y and disregard State Y’s choice-of-law rule. State Y’s substantive law (e.g., its Section 9-501) provides that financing statements should be filed in a filing office in State Y. Note, however, that if the identical perfection issue were to be litigated in State Y, the court would look to State Y’s former Section 9-103 or nonuniform 9-301 and conclude that a filing in State Y is ineffective.

Example 2: In the preceding Example, assume that State X has adopted the official text of this Article, and State Y has adopted a nonuniform Section 9-301(1) under which perfection is governed by the whole law of State X, including its choice-of-law rules. If litigation occurs in State X, the court should look to the substantive law of State Y, which provides that financing statements are to be filed in a filing office in State Y. If litigation occurs in State Y, the court should look to the law of State X, whose choice-of-law rule requires that the court apply the substantive law of State Y. Thus, regardless of the jurisdiction in which the litigation arises, the financing statement should be filed in State Y.

4. Law Governing Perfection: General Rule. Paragraph (1) contains the general rule: the law governing perfection of security interests in both tangible and intangible collateral, whether perfected by filing or automatically, is the law of the jurisdiction of the debtor’s location, as determined under Section 9-307.

Paragraph (1) substantially simplifies the choice-of-law rules. Former Section 9-103 contained different choice-of-law rules for different types of collateral. Under Section 9-301(1), the law of a single jurisdiction governs perfection with respect to most types of collateral, both tangible and intangible. Paragraph (1) eliminates the need for former Section 9-103(1)(c), which concerned purchase-money security interests in tangible collateral that is intended to move from one jurisdiction to the other. It is likely to reduce the fre-

quency of cases in which the governing law changes after a financing statement is properly filed. (Presumably, debtors change their own location less frequently than they change the location of their collateral.) The approach taken in paragraph (1) also eliminates some difficult priority issues and the need to distinguish between “mobile” and “ordinary” goods, and it reduces the number of filing offices in which secured parties must file or search when collateral is located in several jurisdictions.

5. Law Governing Perfection: Exceptions. The general rule is subject to several exceptions. It does not apply to goods covered by a certificate of title (see Section 9-303), deposit accounts (see Section 9-304), investment property (see Section 9-305), or letter-of-credit rights (see Section 9-306). Nor does it apply to possessory security interests, i.e., security interests that the secured party has perfected by taking possession of the collateral (see paragraph (2)), security interests perfected by filing a fixture filing (see subparagraph (3)(A)), security interests in timber to be cut (subparagraph (3)(B)), or security interests in as-extracted collateral (see paragraph (4)).

a. Possessory Security Interests. Paragraph (2) applies to possessory security interests and provides that perfection is governed by the local law of the jurisdiction in which the collateral is located. This is the rule of former Section 9-103(1)(b), except paragraph (2) eliminates the troublesome “last event” test of former law.

The distinction between nonpossessory and possessory security interests creates the potential for the same jurisdiction to apply two different choice-of-law rules to determine perfection in the same collateral. For example, were a secured party in possession of an instrument or document to relinquish possession in reliance on temporary perfection, the applicable law immediately would change from that of the location of the collateral to that of the location of the debtor. The applicability of two different choice-of-law rules for perfection is unlikely to lead to any material practical problems. The perfection rules of one Article 9 jurisdiction are likely to be identical to those of another. Moreover, under paragraph (3), the relative priority of competing security interests in tangible collateral is resolved by reference to the law of the jurisdiction in which the collateral is located, regardless of how the security interests are perfected.

b. Fixture Filings. Under the general rule in paragraph (1), a security interest in fixtures may be perfected by filing in the office specified by Section 9-501(a) as enacted in the jurisdiction in which the debtor is located. However, application of this rule to perfection

of a security interest by filing a fixture filing could yield strange results. For example, perfection of a security interest in fixtures located in Arizona and owned by a Delaware corporation would be governed by the law of Delaware. Although Delaware law would send one to a filing office in Arizona for the place to file a financing statement as a fixture filing, see Section 9-501, Delaware law would not take account of local, nonuniform, real-property filing and recording requirements that Arizona law might impose. For this reason, paragraph (3)(A) contains a special rule for security interests perfected by a fixture filing; the law of the jurisdiction in which the fixtures are located governs perfection, including the formal requisites of a fixture filing. Under paragraph (3)(C), the same law governs priority. Fixtures are “goods” as defined in Section 9-102.

The filing of a financing statement to perfect a security interest in collateral of a transmitting utility constitutes a fixture filing with respect to goods that are or become fixtures. See Section 9-501(b). Accordingly, to perfect a security interest in goods of this kind by a fixture filing, a financing statement must be filed in the office specified by Section 9-501(b) as enacted in the jurisdiction in which the goods are located. If the fixtures collateral is located in more than one State, filing in all of those States will be necessary to perfect a security interest in all the fixtures collateral by a fixture filing. Of course, a security interest in nearly all types of collateral (including fixtures) of a transmitting utility may be perfected by filing in the office specified by Section 9-501(b) as enacted in the jurisdiction in which the transmitting utility is located. However, such a filing will not be effective as a fixture filing except with respect to goods that are located in that jurisdiction.

c. **Timber to Be Cut.** Application of the general rule in paragraph (1) to perfection of a security interest in timber to be cut would yield undesirable results analogous to those described with respect to fixtures. Paragraph (3)(B) adopts a similar solution: perfection is governed by the law of the jurisdiction in which the timber is located. As with fixtures, under paragraph (3)(C), the same law governs priority. Timber to be cut also is “goods” as defined in Section 9-102.

Paragraph (3)(B) applies only to “timber to be cut,” not to timber that has been cut. Consequently, once the timber is cut, the general choice-of-law rule in paragraph (1) becomes applicable. To ensure continued perfection, a secured party should file in both the jurisdiction in which the timber to be cut is located and in the state where the debtor is located. The former filing would be with the office in which a real property mortgage

would be filed, and the latter would be a central filing. See Section 9-501.

d. **As-Extracted Collateral.** Paragraph (4) adopts the rule of former Section 9-103(5) with respect to certain security interests in minerals and related accounts. Like security interests in fixtures perfected by filing a fixture filing, security interests in minerals that are as-extracted collateral are perfected by filing in the office designated for the filing or recording of a mortgage on the real property. For the same reasons, the law governing perfection and priority is the law of the jurisdiction in which the wellhead or minehead is located.

6. **Change in Law Governing Perfection.** When the debtor changes its location to another jurisdiction, the jurisdiction whose law governs perfection under paragraph (1) changes, as well. Similarly, the law governing perfection of a possessory security interest in collateral under paragraph (2) changes when the collateral is removed to another jurisdiction. Nevertheless, these changes will not result in an immediate loss of perfection. See Section 9-316(a), (b).

7. **Law Governing Effect of Perfection and Priority: Goods, Documents, Instruments, Money, Negotiable Documents, and Tangible Chattel Paper.** Under former Section 9-103, the law of a single jurisdiction governed both questions of perfection and those of priority. This Article generally adopts that approach. See paragraph (1). But the approach may create problems if the debtor and collateral are located in different jurisdictions. For example, assume a security interest in equipment located in Pennsylvania is perfected by filing in Illinois, where the debtor is located. If the law of the jurisdiction in which the debtor is located were to govern priority, then the priority of an execution lien on goods located in Pennsylvania would be governed by rules enacted by the Illinois legislature.

To address this problem, paragraph (3)(C) divorces questions of perfection from questions of “the effect of perfection or nonperfection and the priority of a security interest.” Under paragraph (3)(C), the rights of competing claimants to tangible collateral are resolved by reference to the law of the jurisdiction in which the collateral is located. A similar bifurcation applied to security interests in investment property under former Section 9-103(6). See Section 9-305.

Paragraph (3)(C) applies the law of the situs to determine priority only with respect to goods (including fixtures), instruments, money, negotiable documents, and tangible chattel paper. Compare former Section 9-103(1), which applied the law of the location of the collateral to documents, instruments, and “ordinary” (as opposed to “mobile”) goods. This Article does not distinguish among types

of goods. The ordinary/mobile goods distinction appears to address concerns about where to file and search, rather than concerns about priority. There is no reason to preserve this distinction under the bifurcated approach.

Particularly serious confusion may arise when the choice-of-law rules of a given jurisdiction result in each of two competing security interests in the same collateral being governed by a different priority rule. The potential for this confusion existed under former Section 9-103(4) with respect to chattel paper: Perfection by possession was governed by the law of the location of the paper, whereas perfection by filing was governed by the law of the location of the debtor. Consider the mess that would have been created if the language or interpretation of former Section 9-308 were to differ in the two relevant States, or if one of the relevant jurisdictions (e.g., a foreign country) had not adopted Article 9. The potential for confusion could have been exacerbated when a secured party perfected both by taking possession in the State

where the collateral is located (State A) and by filing in the State where the debtor is located (State B)—a common practice for some chattel paper financiers. By providing that the law of the jurisdiction in which the collateral is located governs priority, paragraph (3) substantially diminishes this problem.

8. Non-U.S. Debtors. This Article applies the same choice-of-law rules to all debtors, foreign and domestic. For example, it adopts the bifurcated approach for determining the law applicable to security interests in goods and other tangible collateral. See Comment 5.a., above. The Article contains a new rule specifying the location of non-U.S. debtors for purposes of this Part. The rule appears in Section 9-307 and is explained in the Comments to that section. Former Section 9-103(3)(c), which contained a special choice-of-law rule governing security interests created by debtors located in a non-U.S. jurisdiction, proved unsatisfactory and was deleted.

28-9-302. Law governing perfection and priority of agricultural liens. — While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.

History.

I.C., § 28-9-302, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-302, which comprised 1967, ch. 161, § 9-302, p. 351; am. 1979, ch. 299, § 17, p. 781; am. 1981, ch. 246, § 1, p. 492;

am. 1985, ch. 135, § 48, p. 329; am. 1988, ch. 265, § 566, p. 549; am. 1995, ch. 272, § 10, p. 873; am. 1996, ch. 178, § 3, p. 567, was repealed by S.L. 2001, ch. 208, § 1.

OFFICIAL COMMENT

1. Source. New.

2. Agricultural Liens. This section provides choice-of-law rules for agricultural liens on farm products. Perfection, the effect of perfection or nonperfection, and priority all are governed by the law of the jurisdiction in which the farm products are located. Other choice-of-law rules, including Section 1-301, determine which jurisdiction's law governs other matters, such as the secured party's

rights on default. See Section 9-301, Comment 2. Inasmuch as no agricultural lien on proceeds arises under this Article, this section does not expressly apply to proceeds of agricultural liens. However, if another statute creates an agricultural lien on proceeds, it may be appropriate for courts to apply the choice-of-law rule in this section to determine priority in the proceeds.

28-9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title. — (a) This section applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

(b) Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

(c) The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

History.

I.C., § 28-9-303, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-303, which comprised 1967,

ch. 161, § 9-303, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

JUDICIAL DECISIONS

Choice of Law.

Under subsection (b), Chapter 7 debtors' vehicle ceased to be covered by a California certificate of title and became covered by the Idaho certificate of title laws at the time the application for an Idaho title was tendered;

Idaho law, therefore, determined whether a creditor's security interest was perfected prior to the 11 U.S.C.S. § 547 preference period. *Gugino v. Wachovia Dealer Servs.* (In re Owen), 2009 Bankr. LEXIS 3318 (Bankr. D. Idaho July 15, 2009).

OFFICIAL COMMENT

1. **Source.** Former Section 9-103(2)(a), (b), substantially revised.

2. **Scope of This Section.** This section applies to "goods covered by a certificate of title." The new definition of "certificate of title" in Section 9-102 makes clear that this section applies not only to certificate-of-title statutes under which perfection occurs upon notation of the security interest on the certificate but also to those that contemplate notation but provide that perfection is achieved by another method, e.g., delivery of designated documents to an official. Subsection (a), which is new, makes clear that this section applies to certificates of a jurisdiction having no other contacts with the goods or the debtor. This result comports with most of the reported cases on the subject and with contemporary business practices in the trucking industry.

3. **Law Governing Perfection and Priority.** Subsection (c) is the basic choice-of-law rule for goods covered by a certificate of title. Perfection and priority of a security interest are governed by the law of the jurisdiction under whose certificate of title the goods are covered from the time the goods become cov-

ered by the certificate of title until the goods cease to be covered by the certificate of title.

Normally, under the law of the relevant jurisdiction, the perfection step would consist of compliance with that jurisdiction's certificate-of-title statute and a resulting notation of the security interest on the certificate of title. See Section 9-311(b). In the typical case of an automobile or over-the-road truck, a person who wishes to take a security interest in the vehicle can ascertain whether it is subject to any security interests by looking at the certificate of title. But certificates of title cover certain types of goods in some States but not in others. A secured party who does not realize this may extend credit and attempt to perfect by filing in the jurisdiction in which the debtor is located. If the goods had been titled in another jurisdiction, the lender would be unperfected.

Subsection (b) explains when goods become covered by a certificate of title and when they cease to be covered. Goods may become covered by a certificate of title, even though no certificate of title has issued. Former Section 9-103(2)(b) provided that the law of the juris-

diction issuing the certificate ceases to apply upon “surrender” of the certificate. This Article eliminates the concept of “surrender.” However, if the certificate is surrendered in conjunction with an appropriate application for a certificate to be issued by another jurisdiction, the law of the original jurisdiction ceases to apply because the goods became covered subsequently by a certificate of title from another jurisdiction. Alternatively, the law of the original jurisdiction ceases to apply when the certificate “ceases to be effective” under the law of that jurisdiction. Given the diversity in certificate-of-title statutes, the term “effective” is not defined.

4. Continued Perfection. The fact that the law of one State ceases to apply under subsection (b) does not mean that a security interest perfected under that law becomes unperfected automatically. In most cases, the security interest will remain perfected. See Section 9-316(d), (e). Moreover, a perfected security interest may be subject to defeat by certain buyers and secured parties. See Section 9-337.

5. Inventory. Compliance with a certificate-of-title statute generally is not the method of perfecting security interests in inventory. Section 9-311(d) provides that a security interest created in inventory held by a person in the business of selling goods of that kind is subject to the normal filing rules; compliance with a certificate-of-title statute is not necessary or effective to perfect the security interest. Most certificate-of-title statutes are in accord.

The following example explains the subtle relationship between this rule and the choice-of-law rules in Section 9-303 and former Section 9-103(2):

Example: Goods are located in State A and covered by a certificate of title issued under the law of State A. The State A certificate of title is “clean”; it does not reflect a security interest. Owner takes the goods to State B and sells (trades in) the goods to Dealer, who is in the business of selling goods of that kind and is located (within the meaning of Section 9-307) in State B. As is customary, Dealer retains the duly assigned State A certificate of title pending resale of the goods. Dealer’s inventory financier, SP, obtains a security interest in the goods under its after-acquired property clause.

Under Section 9-311(d) of both State A and State B, Dealer’s inventory financier, SP, must perfect by filing instead of complying with a certificate-of-title statute. If Section 9-303 were read to provide that the law applicable to perfection of SP’s security interest is that of State A, because the goods are covered by a State A certificate, then SP would be required to file in State A under State A’s Section 9-501. That result would be anomalous, to say the

least, since the principle underlying Section 9-311(d) is that the inventory should be treated as ordinary goods.

Section 9-303 (and former Section 9-103(2)) should be read as providing that the law of State B, not State A, applies. A court looking to the forum’s Section 9-303(a) would find that Section 9-303 applies only if two conditions are met: (i) the goods are covered by the certificate as explained in Section 9-303(b), i.e., application had been made for a State (here, State A) to issue a certificate of title covering the goods and (ii) the certificate is a “certificate of title” as defined in Section 9-102, i.e., “a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor.” Stated otherwise, Section 9-303 applies only when compliance with a certificate-of-title statute, and not filing, is the appropriate method of perfection. Under the law of State A, *for purposes of perfecting SP’s security interest in the dealer’s inventory*, the proper method of perfection is filing—not compliance with State A’s certificate-of-title statute. For that reason, the goods are not covered by a “certificate of title,” and the second condition is not met. Thus, Section 9-303 does not apply to the goods. Instead, Section 9-301 applies, and the applicable law is that of State B, where the debtor (dealer) is located.

6. External Constraints on This Section. The need to coordinate Article 9 with a variety of nonuniform certificate-of-title statutes, the need to provide rules to take account of situations in which multiple certificates of title are outstanding with respect to particular goods, and the need to govern the transition from perfection by filing in one jurisdiction to perfection by notation in another all create pressure for a detailed and complex set of rules. In an effort to minimize complexity, this Article does not attempt to coordinate Article 9 with the entire array of certificate-of-title statutes. In particular, Sections 9-303, 9-311, and 9-316(d) and (e) assume that the certificate-of-title statutes to which they apply do not have relation-back provisions (i.e., provisions under which perfection is deemed to occur at a time earlier than when the perfection steps actually are taken). A Legislative Note to Section 9-311 recommends the elimination of relation-back provisions in certificate-of-title statutes affecting perfection of security interests.

Ideally, at any given time, only one certificate of title is outstanding with respect to particular goods. In fact, however, sometimes more than one jurisdiction issues more than one certificate of title with respect to the same goods. This situation results from defects in certificate-of-title laws and the interstate co-

ordination of those laws, not from deficiencies in this Article. As long as the possibility of multiple certificates of title remains, the potential for innocent parties to suffer losses

will continue. At best, this Article can identify clearly which innocent parties will bear the losses in familiar fact patterns.

28-9-304. Law governing perfection and priority of security interests in deposit accounts. — (a) The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.

(b) The following rules determine a bank's jurisdiction for purposes of this part:

(1) If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of this part, this chapter, or the uniform commercial code, that jurisdiction is the bank's jurisdiction.

(2) If paragraph (1) of this subsection does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(3) If neither paragraph (1) nor (2) of this subsection applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(4) If none of the preceding paragraphs apply, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located.

(5) If none of the preceding paragraphs apply, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located.

History.

I.C., § 28-9-304, as added by 2001, ch. 208, § 2, p. 704; am. 2002, ch. 107, § 2, p. 290.

STATUTORY NOTES

Prior Laws.

Former § 28-9-304, which comprised 1967, ch. 161, § 9-304, p. 351; am. 1979, ch. 299, § 18, p. 781; am. 1985, ch. 135, § 49, p. 329;

am. 1995, ch. 272, § 11, p. 873; am. 1996, ch. 7, § 9, p. 9, was repealed by S.L. 2001, ch. 208, § 1.

OFFICIAL COMMENT

1. **Source.** New; derived from Section 8-110(e) and former Section 9-103(6).

2. **Deposit Accounts.** Under this section, the law of the "bank's jurisdiction" governs perfection and priority of a security interest in deposit accounts. Subsection (b) contains rules for determining the "bank's jurisdiction." The substance of these rules is substantially similar to that of the rules determining the "security intermediary's jurisdiction" under former Section 8-110(e), except that sub-

section (b)(1) provides more flexibility than the analogous provision in former Section 8-110(e)(1). Subsection (b)(1) permits the parties to choose the law of one jurisdiction to govern perfection and priority of security interests and a different governing law for other purposes. The parties' choice is effective, even if the jurisdiction whose law is chosen bears no relationship to the parties or the transaction. Section 8-110(e)(1) has been conformed to subsection (b)(1) of this section, and Section

9-305(b)(1), concerning a commodity intermediary's jurisdiction, makes a similar departure from former Section 9-103(6)(e)(i).

3. Change in Law Governing Perfection. When the bank's jurisdiction changes,

the jurisdiction whose law governs perfection under subsection (a) changes, as well. Nevertheless, the change will not result in an immediate loss of perfection. See Section 9-316(f), (g).

28-9-305. Law governing perfection and priority of security interests in investment property. — (a) Except as otherwise provided in subsection (c) of this section, the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

(2) The local law of the issuer's jurisdiction as specified in section 28-8-110(4)[, Idaho Code,] governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

(3) The local law of the securities intermediary's jurisdiction as specified in section 28-8-110(5)[, Idaho Code,] governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(b) The following rules determine a commodity intermediary's jurisdiction for purposes of this part:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this part, this chapter, or the uniform commercial code, that jurisdiction is the commodity intermediary's jurisdiction.

(2) If paragraph (1) of this subsection does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither paragraph (1) nor (2) of this subsection applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of the preceding paragraphs apply, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of the preceding paragraphs apply, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) The local law of the jurisdiction in which the debtor is located governs:

- (1) Perfection of a security interest in investment property by filing;
- (2) Automatic perfection of a security interest in investment property created by a broker or securities intermediary; and
- (3) Automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.

History.

I.C., § 28-9-305, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-305, which comprised 1967, ch. 161, § 9-305, p. 351; am. 1979, ch. 299, § 19, p. 781; am. 1985, ch. 135, § 50, p. 329; am. 1995, ch. 272, § 12, p. 873; am. 1996, ch. 7, § 10, p. 9, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions in paragraphs (a)(2) and (a)(3) were added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. Source. Former Section 9-103(6).

2. Investment Property: General Rules. This section specifies choice-of-law rules for perfection and priority of security interests in investment property. Subsection (a)(1) covers security interests in certificated securities. Subsection (a)(2) covers security interests in uncertificated securities. Subsection (a)(3) covers security interests in security entitlements and securities accounts. Subsection (a)(4) covers security interests in commodity contracts and commodity accounts. The approach of each of these paragraphs is essentially the same. They identify the jurisdiction's law that governs questions of perfection and priority by using the same principles that Article 8 uses to determine other questions concerning that form of investment property. Thus, for certificated securities, the law of the jurisdiction in which the certificate is located governs. Cf. Section 8-110(c). For uncertificated securities, the law of the issuer's jurisdiction governs. Cf. Section 8-110(a). For security entitlements and securities accounts, the law of the securities intermediary's jurisdiction governs. Cf. Section 8-110(b). For commodity contracts and commodity accounts, the law of the commodity intermediary's jurisdiction governs. Because commodity contracts and commodity accounts are not governed by Article 8, subsection (b) contains rules that specify the commodity intermediary's jurisdiction. These are analogous to the rules in Section 8-110(e) specifying a securities intermediary's jurisdiction. Subsection (b)(1) affords the parties greater flexibility than did former Section 9-103(6)(3). See also Section 9-304(b) (bank's jurisdiction); Revised Section 8-110(e)(1) (securities intermediary's jurisdiction).

3. Investment Property: Exceptions.

Subsection (c) establishes an exception to the general rules set out in subsection (a). It provides that perfection of a security interest by filing, automatic perfection of a security interest in investment property created by a debtor who is a broker or securities intermediary (see Section 9-309(10)), and automatic perfection of a security interest in a commodity contract or commodity account of a debtor who is a commodity intermediary (see Section 9-309(11)) are governed by the law of the jurisdiction in which the debtor is located, as determined under Section 9-307.

4. Examples: The following examples illustrate the rules in this section:

Example 1: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law but expressly provides that the law of California is Able's jurisdiction for purposes of the Uniform Commercial Code. Through the account the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer obtains a margin loan from Able. Subsection (a)(3) provides that California law—the law of the securities intermediary's jurisdiction—governs perfection and priority of the security interest, even if California has no other relationship to the parties or the transaction.

Example 2: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law. Through the account the customer holds securities of a Massachusetts

corporation, which Able holds through a clearing corporation located in New York. The customer obtains a loan from a lender located in Illinois. The lender takes a security interest and perfects by obtaining an agreement among the debtor, itself, and Able, which satisfies the requirement of Section 8-106(d)(2) to give the lender control. Subsection (a)(3) provides that Pennsylvania law—the law of the securities intermediary’s jurisdiction—governs perfection and priority of the security interest, even if Pennsylvania has no other relationship to the parties or the transaction.

Example 3: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law. Through the account, the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer borrows from SP-1, and SP-1 files a financing statement in New Jersey. Later, the customer obtains a loan from SP-2. SP-2 takes a security interest and perfects by obtaining an agreement among the debtor, itself, and Able, which satisfies the require-

ment of Section 8-106(d)(2) to give the SP-2 control. Subsection (c) provides that perfection of SP-1’s security interest by filing is governed by the location of the debtor, so the filing in New Jersey was appropriate. Subsection (a)(3), however, provides that Pennsylvania law—the law of the securities intermediary’s jurisdiction—governs all other questions of perfection and priority. Thus, Pennsylvania law governs perfection of SP-2’s security interest, and Pennsylvania law also governs the priority of the security interests of SP-1 and SP-2.

5. Change in Law Governing Perfection. When the issuer’s jurisdiction, the securities intermediary’s jurisdiction, or commodity intermediary’s jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Similarly, the law governing perfection of a possessory security interest in a certificated security changes when the collateral is removed to another jurisdiction, see subsection (a)(1), and the law governing perfection by filing changes when the debtor changes its location. See subsection (c). Nevertheless, these changes will not result in an immediate loss of perfection. See Section 9-316(f), (g).

28-9-306. Law governing perfection and priority of security interests in letter of credit rights. — (a) Subject to subsection (c) of this section, the local law of the issuer’s jurisdiction or a nominated person’s jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter of credit right if the issuer’s jurisdiction or nominated person’s jurisdiction is a state.

(b) For purposes of this part, an issuer’s jurisdiction or nominated person’s jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter of credit right as provided in section 28-5-116[, Idaho Code].

(c) This section does not apply to a security interest that is perfected only under section 28-9-308(d)[, Idaho Code].

History.

I.C., § 28-9-306, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-306, which comprised 1967, ch. 161, § 9-306, p. 351; am. 1979, ch. 299, § 20, p. 781; am. 1995, ch. 272, § 13, p. 873, was repealed by S.L. 2001, ch. 208, § 1.

Compiler’s Notes.

The bracketed insertions at the ends of subsections (b) and (c) were added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. Source. New; derived in part from Section 8-110(e) and former Section 9-103(6).

2. Sui Generis Treatment. This section governs the applicable law for perfection and

priority of security interests in letter-of-credit rights, other than a security interest perfected only under Section 9-308(d) (i.e., as a supporting obligation). The treatment differs substantially from that provided in Section 9-304 for deposit accounts. The basic rule is that the law of the issuer's or nominated person's (e.g., confirmer's) jurisdiction, derived from the terms of the letter of credit itself, controls perfection and priority, but only if the issuer's or nominated person's jurisdiction is a State, as defined in Section 9-102. If the issuer's or nominated person's jurisdiction is not a State, the baseline rule of Section 9-301 applies—perfection and priority are governed by the law of the debtor's location, determined under Section 9-307. Export transactions typically involve a foreign issuer and a domestic nominated person, such as a confirmer, located in a State. The principal goal of this section is to reduce the likelihood that perfection and priority would be governed by the law of a foreign jurisdiction in a transaction that is essentially domestic from the standpoint of the debtor-beneficiary, its creditors, and a domestic nominated person.

3. Issuer's or Nominated Person's Jurisdiction. Subsection (b) defers to the rules established under Section 5-116 for determination of an issuer's or nominated person's jurisdiction.

Example: An Italian bank issues a letter of credit that is confirmed by a New York bank. The beneficiary is a Connecticut corporation. The letter of credit provides that the issuer's liability is governed by Italian law, and the confirmation provides that the confirmer's

liability is governed by the law of New York. Under Sections 9-306(b) and 5-116(a), Italy is the issuer's jurisdiction and New York is the confirmer's (nominated person's) jurisdiction. Because the confirmer's jurisdiction is a State, the law of New York governs perfection and priority of a security interest in the beneficiary's letter-of-credit right against the confirmer. See Section 9-306(a). However, because the issuer's jurisdiction is not a State, the law of that jurisdiction does not govern. See Section 9-306(a). Rather, the choice-of-law rule in Section 9-301(1) applies to perfection and priority of a security interest in the beneficiary's letter-of-credit right against the issuer. Under that section, perfection and priority are governed by the law of the jurisdiction in which the debtor (beneficiary) is located. That jurisdiction is Connecticut. See Section 9-307.

4. Scope of this Section. This section specifies only the law governing perfection, the effect of perfection or nonperfection, and priority of security interests. Section 5-116 specifies the law governing the liability of, and Article 5 (or other applicable law) deals with the rights and duties of, an issuer or nominated person. Perfection, nonperfection, and priority have no effect on those rights and duties.

5. Change in Law Governing Perfection. When the issuer's jurisdiction, or nominated person's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Nevertheless, this change will not result in an immediate loss of perfection. See Section 9-316(f), (g).

28-9-307. Location of debtor. — (a) In this section, “place of business” means a place where a debtor conducts its affairs.

(b) Except as otherwise provided in this section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one (1) place of business is located at its place of business.

(3) A debtor that is an organization and has more than one (1) place of business is located at its chief executive office.

(c) Subsection (b) of this section applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) of this section does not apply, the debtor is located in the District of Columbia.

(d) A person that ceases to exist, have a residence, or have a place of

business continues to be located in the jurisdiction specified by subsections (b) and (c) of this section.

(e) A registered organization that is organized under the law of a state is located in that state.

(f) Except as otherwise provided in subsection (i) of this section, a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located:

(1) In the state that the law of the United States designates, if the law designates a state of location;

(2) In the state that the registered organization, branch or agency designates, if the law of the United States authorizes the registered organization, branch or agency to designate its state of location, including by designating its main office, home office or other comparable office; or

(3) In the District of Columbia, if neither paragraph (1) nor paragraph (2) of this subsection applies.

(g) A registered organization continues to be located in the jurisdiction specified by subsection (e) or (f) of this section notwithstanding:

(1) The suspension, revocation, forfeiture or lapse of the registered organization's status as such in its jurisdiction of organization; or

(2) The dissolution, winding up, or cancellation of the existence of the registered organization.

(h) The United States is located in the District of Columbia.

(i) A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one (1) state.

(j) A foreign air carrier under the federal aviation act of 1958, as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.

(k) This section applies only for purposes of this part.

History.

I.C., § 28-9-307, as added by 2001, ch. 208, § 2, p. 704; am. 2012, ch. 145, § 3, p. 381.

STATUTORY NOTES

Prior Laws.

Former § 28-9-307, which comprised 1967, ch. 161, § 9-307, p. 351; am. 1979, ch. 299, § 21, p. 781; am. 1986, ch. 338, § 1, p. 834; am. 1987, ch. 284, § 5, p. 596, was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2012 amendment, by ch. 145, inserted "including by designating its main office, home office or other comparable office" in paragraph (f)(2).

Federal References.

The federal aviation act of 1958, referred to in subsection (j), is codified as 49 U.S.C.S. § 40101 et seq.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

OFFICIAL COMMENT

1. **Source.** Former Section 9-103(3)(d), substantially revised.

2. **General Rules.** As a general matter, the location of the debtor determines the jurisdiction whose law governs perfection of a security interest. See Sections 9-301(1), 9-305(c). It also governs priority of a security interest in certain types of intangible collateral, such as accounts, electronic chattel paper, and general intangibles. This section determines the location of the debtor for choice-of-law purposes, but not for other purposes. See subsection (k).

Subsection (b) states the general rules: An individual debtor is deemed to be located at the individual's principal residence with respect to both personal and business assets. Any other debtor is deemed to be located at its place of business if it has only one, or at its chief executive office if it has more than one place of business.

As used in this section, a "place of business" means a place where the debtor conducts its affairs. See subsection (a). Thus, every organization, even eleemosynary institutions and other organizations that do not conduct "for profit" business activities, has a "place of business." Under subsection (d), a person who ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction determined by subsection (b).

The term "chief executive office" is not defined in this Section or elsewhere in the Uniform Commercial Code. "Chief executive office" means the place from which the debtor manages the main part of its business operations or other affairs. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. With respect to most multi-state debtors, it will be simple to determine which of the debtor's offices is the "chief executive office." Even when a doubt arises, it would be rare that there could be more than two possibilities. A secured party in such a case may protect itself by perfecting under the law of each possible jurisdiction.

Similarly, the term "principal residence" is not defined. If the security interest in question is a purchase-money security interest in consumer goods which is perfected upon attachment, see Section 9-309(1), the choice of law may make no difference. In other cases, when a doubt arises, prudence may dictate perfecting under the law of each jurisdiction that might be the debtor's "principal residence."

Questions sometimes arise about the location of the debtor with respect to collateral held in a common-law trust. A typical common-law trust is not itself a juridical entity capable of owning property and so would not

be a "debtor" as defined in Section 9-102. Rather, the debtor with respect to property held in a common-law trust typically is the trustee of the trust acting in the capacity of trustee. (The beneficiary would be a "debtor" with respect to its beneficial interest in the trust, but not with respect to the property held in the trust.) If a common-law trust has multiple trustees located in different jurisdictions, a secured party who perfects by filing would be well advised to file a financing statement in each jurisdiction in which a trustee is located, as determined under Section 9-307. Filing in all relevant jurisdictions would insure perfection and minimize any priority complications that otherwise might arise.

The general rules are subject to several exceptions, each of which is discussed below.

3. **Non-U.S. Debtors.** Under the general rules of this section, a non-U.S. debtor normally would be located in a foreign jurisdiction and, as a consequence, foreign law would govern perfection. When foreign law affords no public notice of security interests, the general rule yields unacceptable results.

Accordingly, subsection (c) provides that the normal rules for determining the location of a debtor (i.e., the rules in subsection (b)) apply only if they yield a location that is "a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." The phrase "generally requires" is meant to include legal regimes that generally require notice in a filing or recording system as a condition of perfecting nonpossessory security interests, but which permit perfection by another method (e.g., control, automatic perfection, temporary perfection) in limited circumstances. A jurisdiction that has adopted this Article or an earlier version of this Article is such a jurisdiction. If the rules in subsection (b) yield a jurisdiction whose law does not generally require notice in a filing or registration system and none of the special rules in subsections (e), (f), (i), and (j) applies, the debtor is located in the District of Columbia.

Example 1: Debtor is an English corporation with 7 offices in the United States and its chief executive office in London, England. Debtor creates a security interest in its accounts. Under subsection (b)(3), Debtor would be located in England. However, subsection (c) provides that subsection (b) applies only if English law generally conditions perfection on giving public notice in a filing, recording,

or registration system. Otherwise, Debtor is located in the District of Columbia. Under Section 9-301(1), perfection, the effect of perfection, and priority are governed by the law of the jurisdiction of the debtor's location—here, England or the District of Columbia (depending on the content of English law).

Example 2: Debtor is an English corporation with 7 offices in the United States and its chief executive office in London, England. Debtor creates a security interest in equipment located in London. Under subsection (b)(3) Debtor would be located in England. However, subsection (c) provides that subsection (b) applies only if English law generally conditions perfection on giving public notice in a filing, recording, or registration system. Otherwise, Debtor is located in the District of Columbia. Under Section 9-301(1), perfection is governed by the law of the jurisdiction of the debtor's location, whereas, under Section 9-301(3), the law of the jurisdiction in which the collateral is located—here, England—governs priority.

The foregoing discussion assumes that each transaction bears an appropriate relation to the forum State. In the absence of an appropriate relation, the forum State's entire UCC, including the choice-of-law provisions in Article 9 (Sections 9-301 through 9-307), will not apply. See Section 9-109, Comment 9.

4. Registered Organizations Organized Under Law of a State. Under subsection (e), a "registered organization" (defined in Section 9-102 so as to ordinarily include corporations, limited partnerships, limited liability companies, and statutory trusts) organized under the law of a "State" (defined in Section 9-102) is located in its State of organization. The term "registered organization" includes a business trust described in the second sentence of the term's definition. See Section 9-102. The trust's public organic record, typically the trust agreement, usually will indicate the jurisdiction under whose law the trust is organized.

Subsection (g) makes clear that events affecting the status of a registered organization, such as the dissolution of a corporation or revocation of its charter, do not affect its location for purposes of subsection (e). However, certain of these events may result in, or be accompanied by, a transfer of collateral from the registered organization to another debtor. This section does not determine whether a transfer occurs, nor does it determine the legal consequences of any transfer.

Determining the registered organization-debtor's location by reference to the jurisdiction of organization could provide some important side benefits for the filing systems. A jurisdiction could structure its filing system so that it would be impossible to make a mistake in a registered organization-debtor's

name on a financing statement. For example, a filer would be informed if a filed record designated an incorrect corporate name for the debtor. Linking filing to the jurisdiction of organization also could reduce pressure on the system imposed by transactions in which registered organizations cease to exist—as a consequence of merger or consolidation, for example. The jurisdiction of organization might prohibit such transactions unless steps were taken to ensure that existing filings were refiled against a successor or terminated by the secured party.

5. Registered Organizations Organized Under Law of United States; Branches and Agencies of Banks Not Organized Under Law of United States. Subsection (f) specifies the location of a debtor that is a registered organization organized under the law of the United States. It defers to law of the United States, to the extent that that law determines, or authorizes the debtor to determine, the debtor's location. Thus, if the law of the United States designates a particular State as the debtor's location, that State is the debtor's location for purposes of this Article's choice-of-law rules. Similarly, if the law of the United States authorizes the registered organization to designate its State of location, the State that the registered organization designates is the State in which it is located for purposes of this Article's choice-of-law rules. In other cases, the debtor is located in the District of Columbia.

In some cases, the law of the United States authorizes the registered organization to designate a main office, home office, or other comparable office. See, e.g., 12 U.S.C. Sections 22 and 1464(a); 12 C.F.R. Section 552.3. Designation of such an office constitutes the designation of the State of location for purposes of Section 9-307 (f)(2).

Subsection (f) also specifies the location of a branch or agency in the United States of a foreign bank that has one or more branches or agencies in the United States. The law of the United States authorizes a foreign bank (or, on behalf of the bank, a federal agency) to designate a single home state for all of the foreign bank's branches and agencies in the United States. See 12 U.S.C. Section 3103(c) and 12 C.F.R. Section 211.22. As authorized, the designation constitutes the State of location for the branch or agency for purposes of Section 9-307(f), unless all of a foreign bank's branches or agencies that are in the United States are licensed in only one State, in which case the branches and agencies are located in that State. See subsection (i).

In cases not governed by subsection (f) or (i), the location of a foreign bank is determined by subsections (b) and (c).

6. United States. To the extent that Article 9 governs (see Sections 1-301, 9-109(c)),

the United States is located in the District of Columbia for purposes of this Article's choice-of-law rules. See subsection (h).

7. **Foreign Air Carriers.** Subsection (j) follows former Section 9-103(3)(d). To the extent that it is applicable, the Convention on

the International Recognition of Rights in Aircraft (Geneva Convention) supersedes state legislation on this subject, as set forth in Section 9-311(b), but some nations are not parties to that Convention.

28-9-308. When security interest or agricultural lien is perfected — Continuity of perfection. — (a) Except as otherwise provided in this section and section 28-9-309[, Idaho Code], a security interest is perfected if it has attached and all of the applicable requirements for perfection in sections 28-9-310 through 28-9-316[, Idaho Code,] have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in section 28-9-310[, Idaho Code,] have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

(c) A security interest or agricultural lien is perfected continuously if it is originally perfected by one (1) method under this chapter and is later perfected by another method under this chapter, without an intermediate period when it was unperfected.

(d) Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

(e) Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage or other lien on personal or real property securing the right.

(f) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(g) Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account.

History.

I.C., § 28-9-308, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-308, which comprised I.C., § 28-9-308, as added by 1979, ch. 299, § 23, p. 781, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions in subsections (a) and (b) were added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Perfecting process.

Perfection date.

When not perfected.

Perfecting Process.

According to the language of § 49-510, not only must a lienholder file the proper paperwork with the agency to have its security interest deemed perfected under state law, but the notation of that security interest on the actual title certificate is another distinct “condition of perfection”. Additionally, under § 49-510, a security interest is deemed perfected according to the date noted by the state on the title certificate. *Fitzgerald v. First Sec. Bank* (In re Walker), 161 Bankr. 484 (Bankr. D. Idaho 1993), *aff’d*, 178 Bankr. 497 (D. Idaho 1994), *aff’d*, 77 F.3d 322 (9th Cir. 1996).

The creditor must provide the lien creation date on the title certificate application in order for the state to perform its duty of noting such as the recording date on the title certificate. Failure to note this crucial information is just as fatal to proper perfection of a lien as would be neglecting to supply the name of the lienholder. *Fitzgerald v. First Sec. Bank* (In re Walker), 161 Bankr. 484 (Bankr. D. Idaho 1993), *aff’d*, 178 Bankr. 497 (D. Idaho 1994), *aff’d*, 77 F.3d 322 (9th Cir. 1996).

Perfection Date.

The date on the title certificate constitutes the lender’s perfection date; great uncertainty would be injected into transactions involving motor vehicles if parties were allowed to impeach or contradict the lien recording information on title certificates with non-record facts. *Fitzgerald v. First Sec. Bank* (In re Walker), 161 Bankr. 484 (Bankr. D. Idaho 1993), *aff’d*, 178 Bankr. 497 (D. Idaho 1994), *aff’d*, 77 F.3d 322 (9th Cir. 1996).

When Not Perfected.

The function of the financing statement requirement is to give notice of a potential interest in property of a specifically identified debtor as well as means by which an inquiring party may acquire more detailed information concerning that interest; therefore, a financing statement which did not contain the address of either the debtor or the creditor did not contain the information required, and the filing of such a statement did not constitute perfection of the security interest. *Wood v. Pillsbury Co.*, 38 Bankr. 375 (Bankr. D. Idaho 1983).

OFFICIAL COMMENT

1. **Source.** Former Sections 9-303, 9-115(2).

2. **General Rule.** This Article uses the term “attach” to describe the point at which property becomes subject to a security interest. The requisites for attachment are stated in Section 9-203. When it attaches, a security interest may be either perfected or unperfected. “Perfected” means that the security interest has attached and the secured party has taken all the steps required by this Article as specified in Sections 9-310 through 9-316. A perfected security interest may still be or become subordinate to other interests. See, e.g., Sections 9-320, 9-322. However, in general, after perfection the secured party is protected against creditors and transferees of the debtor and, in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor. See, e.g., Section 9-317.

Subsection (a) explains that the time of perfection is when the security interest has attached and any necessary steps for perfection, such as taking possession or filing, have been taken. The “except” clause refers to the perfection-upon-attachment rules appearing in Section 9-309. It also reflects that other subsections of this section, e.g., subsection (d), contain automatic-perfection rules. If the steps for perfection have been taken in ad-

vance, as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral, then the security interest is perfected when it attaches.

3. **Agricultural Liens.** Subsection (b) is new. It describes the elements of perfection of an agricultural lien.

4. **Continuous Perfection.** The following example illustrates the operation of subsection (c):

Example 1: Debtor, an importer, creates a security interest in goods that it imports and the documents of title that cover the goods. The secured party, Bank, takes possession of a tangible negotiable bill of lading covering certain imported goods and thereby perfects its security interest in the bill of lading and the goods. See Sections 9-313(a), 9-312(c)(1). Bank releases the bill of lading to the debtor for the purpose of procuring the goods from the carrier and selling them. Under Section 9-312(f), Bank continues to have a perfected security interest in the document and goods for 20 days. Bank files a financing statement covering the collateral before the expiration of the 20-day period. Its security interest now continues perfected for as long as the filing is good.

If the successive stages of Bank’s security interest succeed each other without an inter-

vening gap, the security interest is “perfected continuously,” and the date of perfection is when the security interest first became perfected (i.e., when Bank received possession of the tangible bill of lading). If, however, there is a gap between stages—for example, if Bank does not file until after the expiration of the 20-day period specified in Section 9-312(f) and leaves the collateral in the debtor’s possession—then, the chain being broken, the perfection is no longer continuous. The date of perfection would now be the date of filing (after expiration of the 20-day period). Bank’s security interest would be vulnerable to any interests arising during the gap period which under Section 9-317 take priority over an unperfected security interest.

5. Supporting Obligations. Subsection (d) is new. It provides for automatic perfection of a security interest in a supporting obligation for collateral if the security interest in the collateral is perfected. This is unlikely to effect any change in the law prior to adoption of this Article.

Example 2: Buyer is obligated to pay Debtor for goods sold. Buyer’s president guarantees the obligation. Debtor creates a security interest in the right to payment (account) in favor of Lender. Under Section 9-203(f), the security interest attaches to Debtor’s rights under the guarantee (supporting obligation). Under subsection (d), perfection of the security interest in the account constitutes perfection of the security interest in Debtor’s rights under the guarantee.

6. Rights to Payment Secured by Lien. Subsection (e) is new. It deals with the situation in which a security interest is created in a right to payment that is secured by a security interest, mortgage, or other lien.

Example 3: Owner gives to Mortgagee a mortgage on Blackacre to secure a loan. Owner’s obligation to pay is evidenced by a promissory note. In need of working capital, Mortgagee borrows from Financer and creates a security interest in the note in favor of Financer. Section 9-203(g) adopts the traditional view that the mortgage follows the note; i.e., the transferee of the note acquires the mortgage, as well. This subsection adopts a similar principle: perfection of a security interest in the right to payment constitutes perfection of a security interest in the mortgage securing it.

An important consequence of the rules in Section 9-203(g) and subsection (e) is that, by acquiring a perfected security interest in a mortgage (or other secured) note, the secured party acquires a security interest in the mortgage (or other lien) that is senior to the rights of a person who becomes a lien creditor of the mortgagee (Article 9 debtor). See Section 9-317(a)(2). This result helps prevent the separation of the mortgage (or other lien) from the note.

Under this Article, attachment and perfection of a security interest in a secured right to payment do not of themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it. See Section 3-602. If the right to payment is a payment intangible, then Section 9-406 determines whom the account debtor must pay.

Similarly, this Article does not determine who has the power to release a mortgage of record. That issue is determined by real-property law.

7. Investment Property. Subsections (f) and (g) follow former Section 9-115(2).

28-9-309. Security interest perfected upon attachment. — The following security interests are perfected when they attach:

(1) A purchase-money security interest in consumer goods, except as otherwise provided in section 28-9-311(b)[, Idaho Code,] with respect to consumer goods that are subject to a statute or treaty described in section 28-9-311(a)[, Idaho Code];

(2) An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor’s outstanding accounts or payment intangibles;

(3) A sale of a payment intangible;

(4) A sale of a promissory note;

(5) A security interest created by the assignment of a health care insurance receivable to the provider of the health care goods or services;

(6) A security interest arising under section 28-2-401, 28-2-505, 28-2-

711(3) or 28-12-508(5)[, Idaho Code], until the debtor obtains possession of the collateral;

(7) A security interest of a collecting bank arising under section 28-4-210[, Idaho Code];

(8) A security interest of an issuer or nominated person arising under section 28-5-120[, Idaho Code];

(9) A security interest arising in the delivery of a financial asset under section 28-9-206(c)[, Idaho Code];

(10) A security interest in investment property created by a broker or securities intermediary;

(11) A security interest in a commodity contract or a commodity account created by a commodity intermediary;

(12) An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder;

(13) A security interest created by an assignment of a beneficial interest in a decedent's estate; and

(14) A sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance.

History.

I.C., § 28-9-309, as added by 2001, ch. 208, § 2, p. 704; am. 2002, ch. 107, § 3, p. 290.

STATUTORY NOTES

Prior Laws.

Former § 28-9-309, which comprised 1967, ch. 161, § 9-309, p. 351; am. 1985, ch. 135, § 51, p. 329; am. 1995, ch. 272, § 14, p. 873, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions in subsections (1) and (6) to (9) were added by the compiler to conform to the statutory citation style.

RESEARCH REFERENCES

A.L.R. — Creation and perfection of security interests in insurance proceeds under

Article 9 of Uniform Commercial Code. 47 A.L.R.6th 347.

OFFICIAL COMMENT

1. **Source.** Derived from former Sections 9-302(1), 9-115(4)(c), (d), 9-116.

2. **Automatic Perfection.** This section contains the perfection-upon-attachment rules previously located in former Sections 9-302(1), 9-115(4)(c), (d), and 9-116. Rather than continue to state the rule by indirection, this section explicitly provides for perfection upon attachment.

3. **Purchase-Money Security Interest in Consumer Goods.** Former Section 9-302(1)(d) has been revised and appears here as paragraph (1). No filing or other step is required to perfect a purchase-money security interest in consumer goods, other than goods, such as automobiles, that are subject to a statute or treaty described in Section 9-311(a). However, filing is required to perfect

a non-purchase-money security interest in consumer goods and is necessary to prevent a buyer of consumer goods from taking free of a security interest under Section 9-320(b). A fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 9-334.

4. **Rights to Payment.** Paragraph (2) expands upon former Section 9-302(1)(e) by affording automatic perfection to certain assignments of payment intangibles as well as accounts. The purpose of paragraph (2) is to save from ex post facto invalidation casual or isolated assignments-assignments which no one would think of filing. Any person who regularly takes assignments of any debtor's accounts or payment intangibles should file. In this connection Section 9-109(d)(4) through

(7), which excludes certain transfers of accounts, chattel paper, payment intangibles, and promissory notes from this Article, should be consulted.

Paragraphs (3) and (4), which are new, afford automatic perfection to sales of payment intangibles and promissory notes, respectively. They reflect the practice under former Article 9. Under that Article, filing a financing statement did not affect the rights of a buyer of payment intangibles or promissory notes, inasmuch as the former Article did not cover those sales. To the extent that the exception in paragraph (2) covers outright sales of payment intangibles, which automatically are perfected under paragraph (3), the exception is redundant.

Paragraph (14), which is new, affords automatic perfection to sales by individuals of an "account" (as defined in Section 9-102) consisting of the right to winnings in a lottery or other game of chance. Payments on these accounts typically extend for periods of twenty years or more. It would be unduly burdensome for the secured party, who would have no other reason to maintain contact with the seller, to monitor the seller's whereabouts for such a length of time. This paragraph was added in 2001. It applies to a sale of an account described in it, even if the sale was entered into before the effective date of the paragraph. However, if the relative priorities of conflicting claims to the account were established before the paragraph took effect, Article 9 as in effect immediately prior to the date the paragraph took effect determines priority.

5. Health-Care-Insurance Receivables. Paragraph (5) extends automatic perfection to assignments of health-care-insurance receivables if the assignment is made to the health-care provider that provided the health-care goods or services. The primary effect is that, when an individual assigns a right to payment under an insurance policy to the person who provided health-care goods or services, the provider has no need to file a financing statement against the individual. The normal filing requirements apply to other assignments of health-care-insurance receivables covered by this Article, e.g., assignments from the health-care provider to a financier.

6. Investment Property. Paragraph (9) replaces the last clause of former Section 9-116(2), concerning security interests that arise in the delivery of a financial asset.

Paragraphs (10) and (11) replace former Section 9-115(4)(c) and (d), concerning secured financing of securities and commodity firms and clearing corporations. The former sections indicated that, with respect to certain security interests created by a securities intermediary or commodity intermediary, "[t]he filing of a financing statement . . . has

no effect for purposes of perfection or priority with respect to that security interest." No change in meaning is intended by the deletion of the quoted phrase.

Secured financing arrangements for securities firms are currently implemented in various ways. In some circumstances, lenders may require that the transactions be structured as "hard pledges," where the securities are transferred on the books of a clearing corporation from the debtor's account to the lender's account or to a special pledge account for the lender where they cannot be disposed of without the specific consent of the lender. In other circumstances, lenders are content with so-called "agreement to pledge" or "agreement to deliver" arrangements, where the debtor retains the positions in its own account, but reflects on its books that the positions have been hypothecated and promises that the securities will be transferred to the secured party's account on demand.

The perfection and priority rules of this Article are designed to facilitate current secured financing arrangements for securities firms as well as to provide sufficient flexibility to accommodate new arrangements that develop in the future. Hard pledge arrangements are covered by the concept of control. See Sections 9-314, 9-106, 8-106. Non-control secured financing arrangements for securities firms are covered by the automatic perfection rule of paragraph (10). Before the 1994 revision of Articles 8 and 9, agreement to pledge arrangements could be implemented under a provision that a security interest in securities given for new value under a written security agreement was perfected without filing or possession for a period of 21 days. Although the security interests were temporary in legal theory, the financing arrangements could, in practice, be continued indefinitely by rolling over the loans at least every 21 days. Accordingly, a knowledgeable creditor of a securities firm realizes that the firm's securities may be subject to security interests that are not discoverable from any public records. The automatic-perfection rule of paragraph (10) makes it unnecessary to engage in the purely formal practice of rolling over these arrangements every 21 days.

In some circumstances, a clearing corporation may be the debtor in a secured financing arrangement. For example, a clearing corporation that settles delivery-versus-payment transactions among its participants on a net, same-day basis relies on timely payments from all participants with net obligations due to the system. If a participant that is a net debtor were to default on its payment obligation, the clearing corporation would not receive some of the funds needed to settle with participants that are net creditors to the system. To complete end-of-day settlement

after a payment default by a participant, a clearing corporation that settles on a net, same-day basis may need to draw on credit lines and pledge securities of the defaulting participant or other securities pledged by participants in the clearing corporation to secure such drawings. The clearing corporation may be the top-tier securities intermediary for the securities pledged, so that it would not be practical for the lender to obtain control. Even where the clearing corporation holds some types of securities through other intermediaries, however, the clearing corporation is unlikely to be able to complete the arrangements necessary to convey "control" over the securities to be pledged in time to complete settlement in a timely manner. However, the term "securities intermediary" is defined in Section 8-102(a)(14) to include clearing corporations.

Thus, the perfection rule of paragraph (10) applies to security interests in investment property granted by clearing corporations.

7. Beneficial Interests in Trusts. Under former Section 9-302(1)(c), filing was not required to perfect a security interest created by an assignment of a beneficial interest in a trust. Because beneficial interests in trusts are now used as collateral with greater frequency in commercial transactions, under this Article filing is required to perfect a security interest in a beneficial interest.

8. Assignments for Benefit of Creditors. No filing or other action is required to perfect an assignment for the benefit of creditors. These assignments are not financing transactions, and the debtor ordinarily will not be engaging in further credit transactions.

28-9-310. When filing required to perfect security interest or agricultural lien — Security interests and agricultural liens to which filing provisions do not apply. — (a) Except as otherwise provided in subsection (b) of this section and section 28-9-312(b)[, Idaho Code], a financing statement must be filed to perfect all security interests and agricultural liens.

(b) The filing of a financing statement is not necessary to perfect a security interest:

- (1) That is perfected under section 28-9-308(d), (e), (f) or (g)[, Idaho Code];
- (2) That is perfected under section 28-9-309[, Idaho Code,] when it attaches;
- (3) In property subject to a statute, regulation or treaty described in section 28-9-311(a)[, Idaho Code];
- (4) In goods in possession of a bailee which is perfected under section 28-9-312(d)(1) or (2)[, Idaho Code];
- (5) In certificated securities, documents, goods or instruments which is perfected without filing, control, or possession under section 28-9-312(e), (f) or (g)[, Idaho Code];
- (6) In collateral in the secured party's possession under section 28-9-313[, Idaho Code];
- (7) In a certificated security which is perfected by delivery of the security certificate to the secured party under section 28-9-313[, Idaho Code];
- (8) In deposit accounts, electronic chattel paper, electronic documents, investment property, or letter of credit rights which is perfected by control under section 28-9-314[, Idaho Code];
- (9) In proceeds which is perfected under section 28-9-315[, Idaho Code];
- (10) That is perfected under section 28-9-316[, Idaho Code]; or
- (11) In timber sold by the state of Idaho.

(c) If a secured party assigns a perfected security interest or agricultural lien, a filing under this chapter is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

History.

I.C., § 28-9-310, as added by 2001, ch. 208,

§ 2, p. 704; am. 2004, ch. 42, § 26, p. 77; am. 2010, ch. 154, § 1, p. 329.

STATUTORY NOTES

Prior Laws.

Former § 28-9-310, which comprised 1967, ch. 161, § 9-310, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2010 amendment, by ch. 154, added paragraph (b)(11).

Compiler's Notes.

The bracketed insertions throughout the section were added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Failure to file financing statement.
Incomplete financing statement.
Lack of knowledge of unperfected interest.
Motor vehicles.

Failure to File Financing Statement.

The debtor's partner in a used car dealership was among the "third parties" bound by the bank's unperfected security interest in the car. Even if the partner had a purchase money security interest, it was not "perfected" at the time the debtor acquired the automobile, because the partner never filed a financing statement, nor did he "perfect" any purported security interest by taking possession of the collateral until long after the purchase had occurred. *First Sec. Bank v. Woolf*, 111 Idaho 680, 726 P.2d 792 (Ct. App. 1986).

Incomplete Financing Statement.

The function of the financing statement requirement is to give notice of a potential interest in property of a specifically identified debtor, as well as means by which an inquiring party may acquire more detailed information concerning that interest; therefore, a financing statement which did not contain the address of either the debtor or the creditor did

not contain the information required by statute, and the filing of such a statement did not constitute perfection of the security interest. *Wood v. Pillsbury Co.*, 38 Bankr. 375 (Bankr. D. Idaho 1983).

Lack of Knowledge of Unperfected Interest.

The mere fact that the purchaser knew, when he purchased the farm disc, that consignment exchange owed the seller \$3,000 for the disc was not equivalent to knowledge that the seller had retained a security interest; therefore, the buyer acquired the farm disc with priority over the seller's unperfected security interest. *Seitz v. Stecklein*, 111 Idaho 364, 723 P.2d 908 (Ct. App. 1986).

Motor Vehicles.

The Idaho vehicle titles act exclusively governs the perfection of security interests in motor vehicles, unless the vehicles are held in inventory for sale. *Simplot v. Owens*, 119 Idaho 243, 805 P.2d 477 (Ct. App. 1990).

RESEARCH REFERENCES

A.L.R. — Construction and effect of UCC art. 9, dealing with secured transactions, sales of accounts, contract rights and chattel paper. 30 A.L.R.3d 9; 25 A.L.R.5th 696.

Sufficiency of description of crops under UCC §§ 9-203(1)(b) and 9-402(1). 67 A.L.R.3d 308.

Secured transactions: Priorities as between previously perfected security interest and repairman's lien on motor vehicle under Uniform Commercial Code. 69 A.L.R.3d 1162.

Equipment leases as security interest within Uniform Commercial Code § 1-201-37. 76 A.L.R.3d 11.

Determination of purchase price of farm equipment for purposes of UCC § 9-302(1)(c) excusing filing of financing statement. 85 A.L.R.3d 1037.

When is filing of financing statement necessary to perfect an assignment of accounts under UCC § 9-302(1)(e). 85 A.L.R.3d 1050.

Sufficiency of address of debtor in financing

statement required by UCC § 9-402(1). 99 A.L.R.3d 807.

Sufficiency and address of secured party in financing statement required under UCC § 9-402(1). 99 A.L.R.3d 1080.

Sufficiency of description of collateral in financing statement under UCC §§ 9-110 and 9-402. 100 A.L.R.3d 10.

Sufficiency of description of collateral in

security agreement under UCC §§ 9-110 and 9-203. 100 A.L.R.3d 940.

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3). 7 A.L.R.4th 308.

Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC § 9-504(3). 11 A.L.R.4th 241.

OFFICIAL COMMENT

1. **Source.** Former Section 9-302(1), (2).

2. **General Rule.** Subsection (a) establishes a central Article 9 principle: Filing a financing statement is necessary for perfection of security interests and agricultural liens. However, filing is not necessary to perfect a security interest that is perfected by another permissible method, see subsection (b), nor does filing ordinarily perfect a security interest in a deposit account, letter-of-credit right, or money. See Section 9-312(b). Part 5 of the Article deals with the office in which to file, mechanics of filing, and operations of the filing office.

3. **Exemptions from Filing.** Subsection (b) lists the security interests for which filing is not required as a condition of perfection, because they are perfected automatically upon attachment (subsections (b)(2) and (b)(9)) or upon the occurrence of another event (subsections (b)(1), (b)(5), and (b)(9)), because they are perfected under the law of another jurisdiction (subsection (b)(10)), or because they are perfected by another method, such as by the secured party's taking possession or control (subsections (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), and (b)(8)).

4. **Assignments of Perfected Security Interests.** Subsection (c) concerns assignment of a perfected security interest or agricultural lien. It provides that no filing is necessary in connection with an assignment by a secured party to an assignee in order to maintain perfection as against creditors of and transferees from the original debtor.

Example 1: Buyer buys goods from Seller, who retains a security interest in them. After Seller perfects the security interest by filing, Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on X's part, continues perfected against Buyer's transferees and creditors.

Example 2: Dealer creates a security interest in specific equipment in favor of Lender. After Lender perfects the security interest in the equipment by filing, Lender assigns the chattel paper (which includes the perfected security interest in Dealer's equipment) to X.

The security interest in the equipment, in X's hands and without further steps on X's part, continues perfected against *Dealer's* transferees and creditors. However, regardless of whether Lender made the assignment to secure Lender's obligation to X or whether the assignment was an outright sale of the chattel paper, the assignment creates a security interest in the chattel paper in favor of X. Accordingly, X must take whatever steps may be required for perfection in order to be protected against *Lender's* transferees and creditors with respect to the chattel paper.

Subsection (c) applies not only to an assignment of a security interest perfected by filing but also to an assignment of a security interest perfected by a method other than by filing, such as by control or by possession. Although subsection (c) addresses explicitly only the absence of an additional filing requirement, the same result normally will follow in the case of an assignment of a security interest perfected by a method other than by filing. For example, as long as possession of collateral is maintained by an assignee or by the assignor or another person on behalf of the assignee, no further perfection steps need be taken on account of the assignment to continue perfection as against creditors and transferees of the original debtor. Of course, additional action may be required for perfection of the assignee's interest as against creditors and transferees of the *assignor*.

Similarly, subsection (c) applies to the assignment of a security interest perfected by compliance with a statute, regulation, or treaty under Section 9-311(b), such as a certificate-of-title statute. Unless the statute expressly provides to the contrary, the security interest will remain perfected against creditors of and transferees from the original debtor, even if the assignee takes no action to cause the certificate of title to reflect the assignment or to cause its name to appear on the certificate of title. See PEB Commentary No. 12, which discusses this issue under former Section 9-302(3). Compliance with the statute is "equivalent to filing" under Section 9-311(b).

28-9-311. Perfection of security interests in property subject to certain statutes, regulations and treaties. — (a) Except as otherwise provided in subsection (d) of this section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt section 28-9-310(a), Idaho Code;

(2) Section 49-510, Idaho Code; or

(3) A statute of another jurisdiction which provides for a security interest to be indicated on a certificate of title as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) Compliance with the requirements of a statute, regulation or treaty described in subsection (a) of this section for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this chapter. Except as otherwise provided in subsection (d) of this section and sections 28-9-313 and 28-9-316(d) and (e), Idaho Code, for goods covered by a certificate of title, a security interest in property subject to a statute, regulation or treaty described in subsection (a) of this section may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) Except as otherwise provided in subsection (d) of this section and section 28-9-316(d) and (e), Idaho Code, duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation or treaty described in subsection (a) of this section are governed by the statute, regulation or treaty. In other respects, the security interest is subject to this chapter.

(d) During any period in which collateral subject to a statute specified in subsection (a)(2) of this section is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling or leasing goods of that kind, this section does not apply to a security interest in that collateral created by that person as debtor.

History.

I.C., § 28-9-311, as added by 2001, ch. 208, § 2, p. 704; am. 2012, ch. 145, § 4, p. 381.

STATUTORY NOTES

Prior Laws.

Former § 28-9-311, which comprised 1967, ch. 161, § 9-311, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2012 amendment, by ch. 145, substituted "A statute of another jurisdiction which provides for a security interest to be indicated on a certificate of title as a condition" for "A

certificate of title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition" in paragraph (a)(3).

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS

Automobiles.

A security interest in an automobile is perfected under §§ 49-504 and 49-510, not this

section. *Gugino v. GMAC* (In re Laursen), 391 B.R. 47 (Bankr. D. Idaho 2008).

OFFICIAL COMMENT

1. **Source.** Former Section 9-302(3), (4).

2. **Federal Statutes, Regulations, and Treaties.** Subsection (a)(1) exempts from the filing provisions of this Article transactions as to which a system of filing-state or federal-has been established under federal law. Subsection (b) makes clear that when such a system exists, perfection of a relevant security interest can be achieved only through compliance with that system (i.e., filing under this Article is not a permissible alternative).

An example of the type of federal statute referred to in subsection (a)(1) is 49 U.S.C. §§ 44107-11, for civil aircraft of the United States. The Assignment of Claims Act of 1940, as amended, provides for notice to contracting and disbursing officers and to sureties on bonds but does not establish a national filing system and therefore is not within the scope of subsection (a)(1). An assignee of a claim against the United States may benefit from compliance with the Assignment of Claims Act. But regardless of whether the assignee complies with that Act, the assignee must file under this Article in order to perfect its security interest against creditors and transferees of its assignor.

Subsection (a)(1) provides explicitly that the filing requirement of this Article defers only to federal statutes, regulations, or treaties whose requirements for a security interest's obtaining priority over the rights of a lien creditor preempt Section 9-310(a). The provision eschews reference to the term "perfection," inasmuch as Section 9-308 specifies the meaning of that term and a preemptive rule may use other terminology.

3. **State Statutes.** Subsections (a)(2) and (3) exempt from the filing requirements of this Article transactions covered by State certificate-of-title statutes covering motor vehicles and the like. The description of certificate-of-title statutes in subsections (a)(2) and (a)(3) tracks the language of the definition of "certificate of title" in Section 9-102. For a discussion of the operation of state certificate-of-title statutes in interstate contexts, see the Comments to Section 9-303.

Some states have enacted central filing statutes with respect to secured transactions in kinds of property that are of special importance in the local economy. Subsection (a)(2) defers to these statutes with respect to filing for that property.

4. **Inventory Covered by Certificate of Title.** Under subsection (d), perfection of a security interest in the inventory of a person in the business of selling goods of that kind is governed by the normal perfection rules, even if the inventory is subject to a certificate-of-title statute. Compliance with a certificate-of-title statute is both unnecessary and ineffective to perfect a security interest in inventory to which this subsection applies. Thus, a secured party who finances an automobile dealer that is in the business of selling and leasing its inventory of automobiles can perfect a security interest in all the automobiles by filing a financing statement but not by compliance with a certificate-of-title statute.

Subsection (d), and thus the filing and other perfection provisions of this Article, does not apply to inventory that is subject to a certificate-of-title statute and is of a kind that the debtor is not in the business of selling. For example, if goods are subject to a certificate-of-title statute and the debtor is in the business of leasing but not of selling, goods of that kind, the other subsections of this section govern perfection of a security interest in the goods. The fact that the debtor eventually sells the goods does not, of itself, mean that the debtor "is in the business of selling goods of that kind."

The filing and other perfection provisions of this Article apply to goods subject to a certificate-of-title statute only "during any period in which collateral is inventory held for sale or lease or leased." If the debtor takes goods of this kind out of inventory and uses them, say, as equipment, a filed financing statement would not remain effective to perfect a security interest.

5. **Compliance with Perfection Requirements of Other Statute.** Subsection (b) makes clear that compliance with the perfection requirements (i.e., the requirements for obtaining priority over a lien creditor), but not other requirements, of a statute, regulation, or treaty described in subsection (a) is sufficient for perfection under this Article. Perfection of a security interest under such a statute, regulation, or treaty has all the consequences of perfection under this Article.

The interplay of this section with certain certificate-of-title statutes may create confusion and uncertainty. For example, statutes under which perfection does not occur until a

certificate of title is issued will create a gap between the time that the goods are covered by the certificate under Section 9-303 and the time of perfection. If the gap is long enough, it may result in turning some unobjectionable transactions into avoidable preferences under Bankruptcy Code Section 547. (The preference risk arises if more than 30 days passes between the time a security interest attaches (or the debtor receives possession of the collateral, in the case of a purchase-money security interest) and the time it is perfected.) Accordingly, the Legislative Note to this section instructs the legislature to amend the applicable certificate-of-title statute to provide that perfection occurs upon receipt by the appropriate State official of a properly tendered application for a certificate of title on which the security interest is to be indicated.

Under some certificate-of-title statutes, including the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, perfection generally occurs upon delivery of specified documents to a state official but may, under certain circumstances, relate back to the time of attachment. This relation-back feature can create great difficulties for the application of the rules in Sections 9-303 and 9-311(b). Accordingly, the Legislative Note also recommends to legislatures that they remove any relation-back provisions from certificate-of-title statutes affecting security interests.

6. Compliance with Perfection Requirements of Other Statute as Equivalent to Filing. Under Subsection (b), compliance with the perfection requirements (i.e., the requirements for obtaining priority over a lien creditor) of a statute, regulation, or treaty described in subsection (a) “is equivalent to the filing of a financing statement.”

The quoted phrase appeared in former Section 9-302(3). Its meaning was unclear, and many questions arose concerning the extent to which and manner in which Article 9 rules referring to “filing” were applicable to perfection by compliance with a certificate-of-title statute. This Article takes a variety of approaches for applying Article 9’s filing rules to compliance with other statutes and treaties. First, as discussed above in Comment 5, it leaves the determination of some rules, such as the rule establishing time of perfection (Section 9-516(a)), to the other statutes themselves. Second, this Article explicitly applies some Article 9 filing rules to perfection under other statutes or treaties. See, e.g., Section 9-505. Third, this Article makes other Article

9 rules applicable to security interests perfected by compliance with another statute through the “equivalent to . . . filing” provision in the first sentence of Section 9-311(b). The third approach is reflected for the most part in occasional Comments explaining how particular rules apply when perfection is accomplished under Section 9-311(b). See, e.g., Section 9-310, Comment 4; Section 9-315, Comment 6; Section 9-317, Comment 8. The absence of a Comment indicating that a particular filing provision applies to perfection pursuant to Section 9-311(b) does not mean the provision is inapplicable.

7. Perfection by Possession of Goods Covered by Certificate-of-Title Statute.

A secured party who holds a security interest perfected under the law of State A in goods that subsequently are covered by a State B certificate of title may face a predicament. Ordinarily, the secured party will have four months under State B’s Section 9-316(c) and (d) in which to (re)perfect as against a purchaser of the goods by having its security interest noted on a State B certificate. This procedure is likely to require the cooperation of the debtor and any competing secured party whose security interest has been noted on the certificate. Comment 4(e) to former Section 9-103 observed that “that cooperation is not likely to be forthcoming from an owner who wrongfully procured the issuance of a new certificate not showing the out-of-state security interest, or from a local secured party finding himself in a priority contest with the out-of-state secured party.” According to that Comment, “[t]he only solution for the out-of-state secured party under present certificate of title statutes seems to be to reperfect by possession, i.e., by repossessing the goods.” But the “solution” may not have worked: Former Section 9-302(4) provided that a security interest in property subject to a certificate-of-title statute “can be perfected only by compliance therewith.”

Sections 9-316(d) and (e), 9-311(c), and 9-313(b) of this Article resolve the conflict by providing that a security interest that remains perfected solely by virtue of Section 9-316(e) can be (re)perfected by the secured party’s taking possession of the collateral. These sections contemplate only that taking possession of goods covered by a certificate of title will work as a method of perfection. None of these sections creates a right to take possession. Section 9-609 and the agreement of the parties define the secured party’s right to take possession.

28-9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter of credit rights and money — Perfection by permissive filing — Temporary perfection without filing or transfer of possession. — (a) A security interest in chattel paper, negotiable documents, instruments or investment property may be perfected by filing.

(b) Except as otherwise provided in section 28-9-315(c) and (d)[, Idaho Code,] for proceeds:

(1) A security interest in a deposit account may be perfected only by control under section 28-9-314[, Idaho Code];

(2) And except as otherwise provided in section 28-9-308(d)[, Idaho Code], a security interest in a letter of credit right may be perfected only by control under section 28-9-314[, Idaho Code]; and

(3) A security interest in money may be perfected only by the secured party's taking possession under section 28-9-313[, Idaho Code].

(c) While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) A security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

(1) Issuance of a document in the name of the secured party;

(2) The bailee's receipt of notification of the secured party's interest; or

(3) Filing as to the goods.

(e) A security interest in certificated securities, negotiable documents or instruments is perfected without filing or the taking of possession or control for a period of twenty (20) days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for twenty (20) days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

(1) Ultimate sale or exchange; or

(2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) A perfected security interest in a certificated security or instrument remains perfected for twenty (20) days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) Ultimate sale or exchange; or

(2) Presentation, collection, enforcement, renewal or registration of transfer.

(h) After the twenty (20) day period specified in subsection (e), (f) or (g) of this section expires, perfection depends upon compliance with this chapter.

History.

I.C., § 28-9-312, as added by 2001, ch. 208, § 2, p. 704; am. 2004, ch. 42, § 27, p. 77.

STATUTORY NOTES

Prior Laws.

Former § 28-9-312, which comprised 1967, ch. 161, § 9-312, p. 351; am. 1979, ch. 299, § 24, p. 781; am. 1985, ch. 135, § 52, p. 329; am. 1990, ch. 154, § 1, p. 339; am. 1995, ch. 272, § 15, p. 873, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions throughout subsection (b) were added by the compiler to conform to the statutory citation style.

RESEARCH REFERENCES

A.L.R. — Perfection of security interests by possession, delivery, or control under revised

article 9 of Uniform Commercial Code. 53 A.L.R.6th 159.

OFFICIAL COMMENT

1. **Source.** Former Section 9-304, with additions and some changes.

2. **Instruments.** Under subsection (a), a security interest in instruments may be perfected by filing. This rule represents an important change from former Article 9, under which the secured party's taking possession of an instrument was the only method of achieving long-term perfection. The rule is likely to be particularly useful in transactions involving a large number of notes that a debtor uses as collateral but continues to collect from the makers. A security interest perfected by filing is subject to defeat by certain subsequent purchasers (including secured parties). Under Section 9-330(d), purchasers for value who take possession of an instrument without knowledge that the purchase violates the rights of the secured party generally would achieve priority over a security interest in the instrument perfected by filing. In addition, Section 9-331 provides that filing a financing statement does not constitute notice that would preclude a subsequent purchaser from becoming a holder in due course and taking free of all claims under Section 3-306.

3. **Chattel Paper; Negotiable Documents.** Subsection (a) further provides that filing is available as a method of perfection for security interests in chattel paper and negotiable documents. Tangible chattel paper is sometimes delivered to the assignee, and sometimes left in the hands of the assignor for collection. Subsection (a) allows the assignee to perfect its security interest by filing in the latter case. Alternatively, the assignee may perfect by taking possession. See Section

9-313(a). An assignee of electronic chattel paper may perfect by taking control. See Sections 9-314(a), 9-105. The security interest of an assignee who takes possession or control may qualify for priority over a competing security interest perfected by filing. See Section 9-330.

Negotiable documents may be, and usually are, delivered to the secured party. The secured party's taking possession will suffice as a perfection step. See Section 9-313(a). However, as is the case with chattel paper, a security interest in a negotiable document may be perfected by filing.

4. **Investment Property.** A security interest in investment property, including certificated securities, uncertificated securities, security entitlements, and securities accounts, may be perfected by filing. However, security interests created by brokers, securities intermediaries, or commodity intermediaries are automatically perfected; filing is of no effect. See Section 9-309(10), (11). A security interest in all kinds of investment property also may be perfected by control, see Sections 9-314, 9-106, and a security interest in a certificated security also may be perfected by the secured party's taking delivery under Section 8-301. See Section 9-313(a). A security interest perfected only by filing is subordinate to a conflicting security interest perfected by control or delivery. See Section 9-328(1), (5). Thus, although filing is a permissible method of perfection, a secured party who perfects by filing takes the risk that the debtor has granted or will grant a security interest in the same collateral to another party who obtains

control. Also, perfection by filing would not give the secured party protection against other types of adverse claims, since the Article 8 adverse claim cut-off rules require control. See Section 8-510.

5. Deposit Accounts. Under new subsection (b)(1), the only method of perfecting a security interest in a deposit account as original collateral is by control. Filing is ineffective, except as provided in Section 9-315 with respect to proceeds. As explained in Section 9-104, “control” can arise as a result of an agreement among the secured party, debtor, and bank, whereby the bank agrees to comply with instructions of the secured party with respect to disposition of the funds on deposit, even though the debtor retains the right to direct disposition of the funds. Thus, subsection (b)(1) takes an intermediate position between certain non-UCC law, which conditions the effectiveness of a security interest on the secured party’s enjoyment of such dominion and control over the deposit account that the debtor is unable to dispose of the funds, and the approach this Article takes to securities accounts, under which a secured party who is unable to reach the collateral without resort to judicial process may perfect by filing. By conditioning perfection on “control,” rather than requiring the secured party to enjoy absolute dominion to the exclusion of the debtor, subsection (b)(1) permits perfection in a wide variety of transactions, including those in which the secured party actually relies on the deposit account in extending credit and maintains some meaningful dominion over it, but does not wish to deprive the debtor of access to the funds altogether.

6. Letter-of-Credit Rights. Letter-of-credit rights commonly are “supporting obligations,” as defined in Section 9-102. Perfection as to the related account, chattel paper, document, general intangible, instrument, or investment property will perfect as to the letter-of-credit rights. See Section 9-308(d). Subsection (b)(2) provides that, in other cases, a security interest in a letter-of-credit right may be perfected only by control. “Control,” for these purposes, is explained in Section 9-107.

7. Goods Covered by Document of Title. Subsection (c) applies to goods in the possession of a bailee who has issued a negotiable document covering the goods. Subsection (d) applies to goods in the possession of a bailee who has issued a nonnegotiable document of title, including a document of title that is “non-negotiable” under Section 7-104. Section 9-313 governs perfection of a security interest in goods in the possession of a bailee who has not issued a document of title.

Subsection (c) clarifies the perfection and priority rules in former Section 9-304(2). Consistently with the provisions of Article 7,

subsection (c) takes the position that, as long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document. Accordingly, a security interest in goods covered by a negotiable document may be perfected by perfecting a security interest in the document. The security interest also may be perfected by another method, e.g., by filing. The priority rule in subsection (c) governs only priority between (i) a security interest in goods which is perfected by perfecting in the document and (ii) a security interest in the goods which becomes perfected by another method while the goods are covered by the document.

Example 1: While wheat is in a grain elevator and covered by a negotiable warehouse receipt, Debtor creates a security interest in the wheat in favor of SP-1 and SP-2. SP-1 perfects by filing a financing statement covering “wheat.” Thereafter, SP-2 perfects by filing a financing statement describing the warehouse receipt. Subsection (c)(1) provides that SP-2’s security interest is perfected. Subsection (c)(2) provides that SP-2’s security interest is senior to SP-1’s.

Example 2: The facts are as in Example 1, but SP-1’s security interest attached and was perfected before the goods were delivered to the grain elevator. Subsection (c)(2) does not apply, because SP-1’s security interest did not become perfected during the time that the wheat was in the possession of a bailee. Rather, the first-to-file-or-perfect priority rule applies. See Section 9-322.

A secured party may become “a holder to whom a negotiable document of title has been duly negotiated” under Section 7-501. If so, the secured party acquires the rights specified by Article 7. Article 9 does not limit those rights, which may include the right to priority over an earlier-perfected security interest. See Section 9-331(a).

Subsection (d) takes a different approach to the problem of goods covered by a nonnegotiable document. Here, title to the goods is not looked on as being locked up in the document, and the secured party may perfect its security interest directly in the goods by filing as to them. The subsection provides two other methods of perfection: issuance of the document in the secured party’s name (as consignee of a straight bill of lading or the person to whom delivery would be made under a non-negotiable warehouse receipt) and receipt of notification of the secured party’s interest by the bailee. Perfection under subsection (d) occurs when the bailee receives notification of the secured party’s interest in the goods, regardless of who sends the notification. Receipt of notification is effective to perfect, regardless of whether the bailee responds. Unlike former Section 9-304(3), from which it derives, subsection (d) does not apply

to goods in the possession of a bailee who has not issued a document of title. Section 9-313(c) covers that case and provides that perfection by possession as to goods not covered by a document requires the bailee's acknowledgment.

8. Temporary Perfection Without Having First Otherwise Perfected. Subsection (e) follows former Section 9-304(4) in giving perfected status to security interests in certificated securities, instruments, and negotiable documents for a short period (reduced from 21 to 20 days, which is the time period generally applicable in this Article), although there has been no filing and the collateral is in the debtor's possession. The 20-day temporary perfection runs from the date of attachment. There is no limitation on the purpose for which the debtor is in possession, but the secured party must have given "new value" (defined in Section 9-102) under an authenticated security agreement.

9. Maintaining Perfection After Surrendering Possession. There are a variety of legitimate reasons — many of them are described in subsections (f) and (g) — why certain types of collateral must be released temporarily to a debtor. No useful purpose would be served by cluttering the files with records of such exceedingly short term transactions.

Subsection (f) affords the possibility of 20-day perfection in negotiable documents and goods in the possession of a bailee but not covered by a negotiable document. Subsection (g) provides for 20-day perfection in certificated securities and instruments. These sub-

sections derive from former Section 9-305(5). However, the period of temporary perfection has been reduced from 21 to 20 days, which is the time period generally applicable in this Article, and "enforcement" has been added in subsection (g) as one of the special and limited purposes for which a secured party can release an instrument or certificated security to the debtor and still remain perfected. The period of temporary perfection runs from the date a secured party who already has a perfected security interest turns over the collateral to the debtor. There is no new value requirement, but the turnover must be for one or more of the purposes stated in subsection (f) or (g). The 20-day period may be extended by perfecting as to the collateral by another method before the period expires. However, if the security interest is not perfected by another method until after the 20-day period expires, there will be a gap during which the security interest is unperfected.

Temporary perfection extends only to the negotiable document or goods under subsection (f) and only to the certificated security or instrument under subsection (g). It does not extend to proceeds. If the collateral is sold, the security interest will continue in the proceeds for the period specified in Section 9-315.

Subsections (f) and (g) deal only with perfection. Other sections of this Article govern the priority of a security interest in goods after surrender of the document covering them. In the case of a purchase-money security interest in inventory, priority may be conditioned upon giving notification to a prior inventory financier. See Section 9-324.

28-9-313. When possession by or delivery to secured party perfects security interest without filing. — (a) Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under section 28-8-301[, Idaho Code].

(b) With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in section 28-9-316(d)[, Idaho Code].

(c) With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

- (1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or
- (2) The person takes possession of the collateral after having authenti-

cated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 28-8-301[, Idaho Code], and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) of this section or section 28-8-301(1)[, Idaho Code], even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees, or law other than this chapter otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or
(2) To redeliver the collateral to the secured party.

(i) A secured party does not relinquish possession, even if a delivery under subsection (h) of this section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees, or law other than this chapter otherwise provides.

History.

I.C., § 28-9-313, as added by 2001, ch. 208,
§ 2, p. 704; am. 2004, ch. 42, § 28, p. 77.

STATUTORY NOTES

Prior Laws.

Former § 28-9-313, which comprised I.C., § 28-9-313, as added by 1979, ch. 299, § 26, p. 781, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions in subsections (a), (b), (e), and (g) were added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Bailment.

Possession as cure of void mortgage.

Bailment.

Fact that checks held by bailee-trustee in which respondents had a security interest had not been indorsed by payee did not affect respondent's perfected security interest since possession is sufficient under this section and legal title in bailee-trustee is not required. *Barney v. Rigby Loan & Inv. Co.*, 344 F. Supp. 694 (D. Idaho 1972).

Respondent's security interest in checks became perfected when bailee-trustee of checks learned of respondent's security interest since respondent was deemed to have possession at that point, and perfected security interest was not contingent on state

court, recognition of the trust, or bailment. *Barney v. Rigby Loan & Inv. Co.*, 344 F. Supp. 694 (D. Idaho 1972).

Possession as Cure of Void Mortgage.

Where chattel mortgage was valid between parties, though for some reason it was void as to creditors, yet, if property be delivered to mortgagee prior to time any specific right or lien thereon is acquired by creditor, possession of such mortgagee was valid, and may be maintained, and property sold under provisions of the mortgage. *Equitable Trust Co. v. Great Shoshone & Twin Falls Water Power Co.*, 245 F. 697 (9th Cir. 1917).

RESEARCH REFERENCES

A.L.R. — Perfection of security interests by possession, delivery, or control under revised

article 9 of Uniform Commercial Code. 53 A.L.R.6th 159.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-305, 9-115(6).

2. **Perfection by Possession.** As under the common law of pledge, no filing is required by this Article to perfect a security interest if the secured party takes possession of the collateral. See Section 9-310(b)(6).

This section permits a security interest to be perfected by the taking of possession only when the collateral is goods, instruments, negotiable documents, money, or tangible chattel paper. Accounts, commercial tort claims, deposit accounts, investment property, letter-of-credit rights, letters of credit, and oil, gas, or other minerals before extraction are excluded. (But see Comment 6, below, regarding certificated securities.) A security interest in accounts and payment intangibles—property not ordinarily represented by any writing whose delivery operates to transfer the right to payment—may under this Article be perfected only by filing. This rule would not be affected by the fact that a security agreement or other record described the assignment of such collateral as a “pledge.” Section 9-309(2) exempts from filing certain assignments of accounts or payment intangibles which are out of the ordinary course of financing. These exempted assignments are perfected when they attach. Similarly, under Section 9-309(3), sales of payment intangibles are automatically perfected.

3. **“Possession.”** This section does not define “possession.” It adopts the general concept as it developed under former Article 9. As under former Article 9, in determining whether a particular person has possession,

the principles of agency apply. For example, if the collateral is in possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession, and subsection (c) does not apply. Sometimes a person holds collateral both as an agent of the secured party and as an agent of the debtor. The fact of dual agency is not of itself inconsistent with the secured party's having taken possession (and thereby having rendered subsection (c) inapplicable). The debtor cannot qualify as an agent for the secured party for purposes of the secured party's taking possession. And, under appropriate circumstances, a court may determine that a person in possession is so closely connected to or controlled by the debtor that the debtor has retained effective possession, even though the person may have agreed to take possession on behalf of the secured party. If so, the person's taking possession would not constitute the secured party's taking possession and would not be sufficient for perfection. See also Section 9-205(b). In a typical escrow arrangement, where the escrowee has possession of collateral as agent for both the secured party and the debtor, the debtor's relationship to the escrowee is not such as to constitute retention of possession by the debtor.

4. **Goods in Possession of Third Party: Perfection.** Former Section 9-305 permitted perfection of a security interest by notification to a bailee in possession of collateral. This Article distinguishes between goods in the possession of a bailee who has issued a docu-

ment of title covering the goods and goods in the possession of a third party who has not issued a document. Section 9-312(c) or (d) applies to the former, depending on whether the document is negotiable. Section 9-313(c) applies to the latter. It provides a method of perfection by possession when the collateral is possessed by a third person who is not the secured party's agent.

Notification of a third person does not suffice to perfect under Section 9-313(c). Rather, perfection does not occur unless the third person authenticates an acknowledgment that it holds possession of the collateral for the secured party's benefit. Compare Section 9-312(d), under which receipt of notification of the security party's interest by a bailee holding goods covered by a nonnegotiable document is sufficient to perfect, even if the bailee does not acknowledge receipt of the notification. A third person may acknowledge that it will hold for the secured party's benefit goods to be received in the future. Under these circumstances, perfection by possession occurs when the third person obtains possession of the goods.

Under subsection (c), acknowledgment of notification by a "lessee . . . in . . . ordinary course of . . . business" (defined in Section 2A-103) does not suffice for possession. The section thus rejects the reasoning of *In re Atlantic Systems, Inc.*, 135 B.R. 463 (Bankr. S.D.N.Y. 1992) (holding that notification to debtor-lessor's lessee sufficed to perfect security interest in leased goods). See Steven O. Weise, *Perfection by Possession: The Need for an Objective Test*, 29 Idaho Law Rev. 705 (1992-93) (arguing that lessee's possession in ordinary course of debtor-lessor's business does not provide adequate public notice of possible security interest in leased goods). Inclusion of a per se rule concerning lessees is not meant to preclude a court, under appropriate circumstances, from determining that a third person is so closely connected to or controlled by the debtor that the debtor has retained effective possession. If so, the third person's acknowledgment would not be sufficient for perfection.

In some cases, it may be uncertain whether a person who has possession of collateral is an agent of the secured party or a non-agent bailee. Under those circumstances, prudence might suggest that the secured party obtain the person's acknowledgment to avoid litigation and ensure perfection by possession regardless of how the relationship between the secured party and the person is characterized.

5. No Relation Back. Former Section 9-305 provided that a security interest is perfected by possession from the time possession is taken "without a relation back." As the Comment to former Section 9-305 observed, the relation-back theory, under which the

taking of possession was deemed to relate back to the date of the original security agreement, has had little vitality since the 1938 revision of the Federal Bankruptcy Act. The theory is inconsistent with former Article 9 and with this Article. See Section 9-313(d). Accordingly, this Article deletes the quoted phrase as unnecessary. Where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected. The only exceptions to this rule are the short, 20-day periods of perfection provided in Section 9-312(e), (f), and (g), during which a debtor may have possession of specified collateral in which there is a perfected security interest.

6. Certificated Securities. The second sentence of subsection (a) reflects the traditional rule for perfection of a security interest in certificated securities. Compare Section 9-115(6) (1994 Official Text); Sections 8-321, 8-313(1)(a) (1978 Official Text); Section 9-305 (1972 Official Text). It has been modified to refer to "delivery" under Section 8-301. Corresponding changes appear in Section 9-203(b).

Subsection (e) which is new, applies to a secured party in possession of security certificates or another person who has taken delivery of security certificates and holds them for the secured party's benefit under Section 8-301. See Comment 8.

Under subsection (e), a possessory security interest in a certificated security remains perfected until the debtor obtains possession of the security certificate. This rule is analogous to that of Section 9-314(c), which deals with perfection of security interests in investment property by control. See Section 9-314, Comment 3.

7. Goods Covered by Certificate of Title. Subsection (b) is necessary to effect changes to the choice-of-law rules governing goods covered by a certificate of title. These changes are described in the Comments to Section 9-311. Subsection (b), like subsection (a), does not create a right to take possession. Rather, it indicates the circumstances under which the secured party's taking possession of goods covered by a certificate of title is effective to perfect a security interest in the goods: the goods become covered by a certificate of title issued by this State at a time when the security interest is perfected by any method under the law of another jurisdiction.

8. Goods in Possession of Third Party: No Duty to Acknowledge; Consequences of Acknowledgment. Subsections (f) and (g) are new and address matters as to which former Article 9 was silent. They derive in part from Section 8-106(g). Subsection (f) provides that a person in possession of collateral is not required to acknowledge that it holds for a secured party. Subsection (g)(1) provides

that an acknowledgment is effective even if wrongful as to the debtor. Subsection (g)(2) makes clear that an acknowledgment does not give rise to any duties or responsibilities under this Article. Arrangements involving the possession of goods are hardly standardized. They include bailments for services to be performed on the goods (such as repair or processing), for use (leases), as security (pledges), for carriage, and for storage. This Article leaves to the agreement of the parties and to any other applicable law the imposition of duties and responsibilities upon a person who acknowledges under subsection (c). For example, by acknowledging, a third party does not become obliged to act on the secured party's direction or to remain in possession of the collateral unless it agrees to do so or other law so provides.

9. Delivery to Third Party by Secured Party. New subsections (h) and (i) address the practice of mortgage warehouse lenders. These lenders typically send mortgage notes to prospective purchasers under cover of let-

ters advising the prospective purchasers that the lenders hold security interests in the notes. These lenders relied on notification to maintain perfection under former 9-305. Requiring them to obtain authenticated acknowledgments from each prospective purchaser under subsection (c) could be unduly burdensome and disruptive of established practices. Under subsection (h), when a secured party in possession itself delivers the collateral to a third party, instructions to the third party would be sufficient to maintain perfection by possession; an acknowledgment would not be necessary. Under subsection (i), the secured party does not relinquish possession by making a delivery under subsection (h), even if the delivery violates the rights of the debtor. That subsection also makes clear that a person to whom collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this Article provides otherwise.

28-9-314. Perfection by control. — (a) A security interest in investment property, deposit accounts, letter of credit rights, electronic chattel paper, or electronic documents may be perfected by control of the collateral under section 28-7-106, 28-9-104, 28-9-105, 28-9-106 or 28-9-107[, Idaho Code].

(b) A security interest in deposit accounts, electronic chattel paper, letter of credit rights, or electronic documents is perfected by control under section 28-7-106, 28-9-104, 28-9-105 or 28-9-107[, Idaho Code], when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) A security interest in investment property is perfected by control under section 28-9-106[, Idaho Code], from the time the secured party obtains control and remains perfected by control until:

- (1) The secured party does not have control; and
- (2) One (1) of the following occurs:
 - (A) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate;
 - (B) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or
 - (C) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

History.

I.C., § 28-9-314, as added by 2001, ch. 208, § 2, p. 704; am. 2004, ch. 42, § 29, p. 77.

STATUTORY NOTES

Prior Laws.

Former § 28-9-314, which comprised 1967,

ch. 161, § 9-314, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions throughout this

section were added by the compiler to conform to the statutory citation style.

RESEARCH REFERENCES

A.L.R. — Perfection of security interests by possession, delivery, or control under revised

article 9 of Uniform Commercial Code. 53 A.L.R.6th 159.

OFFICIAL COMMENT

1. **Source.** Substantially new; derived in part from former Section 9-115(4).

2. **Control.** This section provides for perfection by control with respect to investment property, deposit accounts, letter-of-credit rights, and electronic chattel paper. For explanations of how a secured party takes control of these types of collateral, see Sections 9-104 through 9-107. Subsection (b) explains when a security interest is perfected by control and how long a security interest remains perfected by control. Like Section 9-313(d) and for the same reasons, subsection (b) makes no reference to the doctrine of "relation back." See Section 9-313, Comment 5.

3. **Investment Property.** Subsection (c) provides a special rule for investment property. Once a secured party has control, its security interest remains perfected by control until the secured party ceases to have control and the debtor receives possession of collateral that is a certificated security, becomes the registered owner of collateral that is an uncertificated security, or becomes the entitlement holder of collateral that is a security entitlement. The result is particularly important in the "repledge" context. See Section 9-207, Comment 5.

In a transaction in which a secured party who has control grants a security interest in investment property or sells outright the in-

vestment property, by virtue of the debtor's consent or applicable legal rules, a purchaser from the secured party typically will cut off the debtor's rights in the investment property or be immune from the debtor's claims. See Section 9-207, Comments 5 and 6. If the investment property is a security, the debtor normally would retain no interest in the security following the purchase from the secured party, and a claim of the debtor against the secured party for redemption (Section 9-623) or otherwise with respect to the security would be a purely personal claim. If the investment property transferred by the secured party is a financial asset in which the debtor had a security entitlement credited to a securities account maintained with the secured party as a securities intermediary, the debtor's claim against the secured party could arise as a part of its securities account notwithstanding its personal nature. (This claim would be analogous to a "credit balance" in the securities account, which is a component of the securities account even though it is a personal claim against the intermediary.) In the case in which the debtor may retain an interest in investment property notwithstanding a repledge or sale by the secured party, subsection (c) makes clear that the security interest will remain perfected by control.

28-9-315. Secured party's rights on disposition of collateral and in proceeds. — (a) Except as otherwise provided in this chapter and in section 28-2-403(2)[, Idaho Code]:

(1) A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and

(2) A security interest attaches to any identifiable proceeds of collateral.

(b) Proceeds that are commingled with other property are identifiable proceeds:

(1) If the proceeds are goods, to the extent provided by section 28-9-336[, Idaho Code]; and

(2) If the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of

equitable principles, that is permitted under law other than this chapter with respect to commingled property of the type involved.

(c) A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.

(d) A perfected security interest in proceeds becomes unperfected on the twenty-first day after the security interest attaches to the proceeds unless:

(1) The following conditions are satisfied:

(A) a filed financing statement covers the original collateral;

(B) the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and

(C) the proceeds are not acquired with cash proceeds;

(2) The proceeds are identifiable cash proceeds; or

(3) The security interest in the proceeds is perfected other than under subsection (c) of this section when the security interest attaches to the proceeds or within twenty (20) days thereafter.

(e) If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under subsection (d)(1) of this section becomes unperfected at the later of:

(1) When the effectiveness of the filed financing statement lapses under section 28-9-515[, Idaho Code,] or is terminated under section 28-9-513[, Idaho Code]; or

(2) The twenty-first day after the security interest attaches to the proceeds.

History.

I.C., § 28-9-315, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-315, which comprised 1967, ch. 161, § 9-315, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions in the introduc-

tory paragraph in subsection (a), in paragraph (b)(1), and in paragraph (e)(1) were added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

ANALYSIS

Interest in proceeds.
Proceeds.

Interest In Proceeds.

Attorney's security interest in the promissory note automatically attached to any proceeds of the note, including any rights arising out of the note. The security agreement did not limit the types of proceeds to which the attorney's security interest would attach, because the attorney identified specific proceeds in the security agreement, including any judgments arising out of a collection action.

Karle v. Visser, 141 Idaho 804, 118 P.3d 136 (2005).

Proceeds.

Debtors settled with an electrical company whose negligence had caused injuries to debtors' cattle; the settlement constituted proceeds under this section, making it subject to the interests of creditors who held a security interest in the cattle. In re Wiersma, 283

Bankr. 294 (Bankr. D. Idaho 2002), *aff'd* in part, 324 Bankr. 92 (B.A.P. 9th Cir. 2005).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Interest in proceeds.
Loss of security interest.
Sales agreement.
Unauthorized transfer.
Waiver.

Interest in Proceeds.

Holder of trust receipt on car sold by trustee to another dealer was entitled to recognize the sale and pursue its remedy against proceeds of the sale deposited in trustee's bank account. *Commercial Credit Corp. v. Bosse*, 76 Idaho 409, 283 P.2d 937 (1955).

The interest of the holder of a trust receipt on a car sold by the trustee to another dealer was a property interest and not a lien and a holder of trust receipt was entitled to claim proceeds of sale, which were deposited in trustee's bank account and subsequently attached by sheriff for taxes due the federal government by the trustee. *Commercial Credit Corp. v. Bosse*, 76 Idaho 409, 283 P.2d 937 (1955).

Loss of Security Interest.

Where the course of dealing between secured party and farmers clearly indicated the authorization to sell crops in which secured party held security interest and that secured party further authorized particular sale by the farmers to insolvent buyer, secured party lost its security interest in the collateral, notwithstanding argument that it merely "conditionally" authorized the sale. *Western Idaho Prod. Credit Ass'n v. Simplot Feed Lots, Inc.*, 106 Idaho 260, 678 P.2d 52 (1984).

A secured party's perfected security interest lapses when the collateral is sold with the secured party's consent, where the secured party does not condition its consent to the transfer upon the simultaneous execution of a security agreement and financing statement

by the transferee in favor of the secured party. *Trustee Servs. Corp v. East River Lumber Co. (In re Hodge Forest Indus., Inc.)*, 59 Bankr. 801 (Bankr. D. Idaho 1986).

Sales Agreement.

A sales agreement, executed at the same time as a security agreement and making reference to it, must be construed with the security agreement to determine the meaning of the parties' entire agreement. *Newgen v. OK Livestock Exch.*, 117 Idaho 445, 788 P.2d 846 (Ct. App. 1990).

Unauthorized Transfer.

In action for conversion of inventory of debtor against supplier who held perfected security interest in inventory, the return of the inventory to the supplier because it was a major part in value of debtor's business inventory and was transferred to satisfy an existing debt due to supplier, was not in the ordinary course of debtor's business, and, therefore, was not authorized by the express terms of the security agreement that permitted sale or disposal of collateral only in ordinary course of business. *First Sec. Bank v. Absco Whse., Inc.*, 104 Idaho 853, 664 P.2d 281 (Ct. App. 1983).

Waiver.

The district court erred in determining that the holders of security interest in cows waived their interest by authorizing the sale of culled cows, as no such authorization could be inferred from the language of the sale agreement. *Newgen v. OK Livestock Exch.*, 117 Idaho 445, 788 P.2d 846 (Ct. App. 1990).

OFFICIAL COMMENT

1. **Source.** Former Section 9-306.

2. **Continuation of Security Interest or Agricultural Lien Following Disposition of Collateral.** Subsection (a)(1), which derives from former Section 9-306(2), contains the general rule that a security interest survives disposition of the collateral. In these cases, the secured party may repossess the collateral from the transferee or, in an appropriate case, maintain an action for conversion. The secured party may claim both any

proceeds and the original collateral but, of course, may have only one satisfaction.

In many cases, a purchaser or other transferee of collateral will take free of a security interest, and the secured party's only right will be to proceeds. For example, the general rule does not apply, and a security interest does not continue in collateral, if the secured party authorized the disposition, in the agreement that contains the security agreement or otherwise. Subsection (a)(1) adopts the view

of PEB Commentary No. 3 and makes explicit that the authorized disposition to which it refers is an authorized disposition “free of” the security interest or agricultural lien. The secured party’s right to proceeds under this section or under the express terms of an agreement does not in itself constitute an authorization of disposition. The change in language from former Section 9-306(2) is not intended to address the frequently litigated situation in which the effectiveness of the secured party’s consent to a disposition is conditioned upon the secured party’s receipt of the proceeds. In that situation, subsection (a) leaves the determination of authorization to the courts, as under former Article 9.

This Article contains several provisions under which a transferee takes free of a security interest or agricultural lien. For example, Section 9-317 states when transferees take free of unperfected security interests; Sections 9-320 and 9-321 on goods, 9-321 on general intangibles, 9-330 on chattel paper and instruments, and 9-331 on negotiable instruments, negotiable documents, and securities state when purchasers of such collateral take free of a security interest, even though perfected and even though the disposition was not authorized. Section 9-332 enables most transferees (including non-purchasers) of funds from a deposit account and most transferees of money to take free of a perfected security interest in the deposit account or money.

Likewise, the general rule that a security interest survives disposition does not apply if the secured party entrusts goods collateral to a merchant who deals in goods of that kind and the merchant sells the collateral to a buyer in ordinary course of business. Section 2-403(2) gives the merchant the power to transfer all the secured party’s rights to the buyer, even if the sale is wrongful as against the secured party. Thus, under subsection (a)(1), an entrusting secured party runs the same risk as any other entruster.

3. Secured Party’s Right to Identifiable Proceeds. Under subsection (a)(2), which derives from former Section 9-306(2), a security interest attaches to any identifiable “proceeds,” as defined in Section 9-102. See also Section 9-203(f). Subsection (b) is new. It indicates when proceeds commingled with other property are identifiable proceeds and permits the use of whatever methods of tracing other law permits with respect to the type of property involved. Among the “equitable principles” whose use other law may permit is the “lowest intermediate balance rule.” See Restatement (2d), Trusts § 202.

4. Automatic Perfection in Proceeds: General Rule. Under subsection (c), a security interest in proceeds is a perfected security interest if the security interest in the

original collateral was perfected. This Article extends the period of automatic perfection in proceeds from 10 days to 20 days. Generally, a security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds. See subsection (d). The loss of perfected status under subsection (d) is prospective only. Compare, e.g., Section 9-515(c) (deeming security interest unperfected retroactively).

5. Automatic Perfection in Proceeds: Proceeds Acquired with Cash Proceeds. Subsection (d)(1) derives from former Section 9-306(3)(a). It carries forward the basic rule that a security interest in proceeds remains perfected beyond the period of automatic perfection if a filed financing statement covers the original collateral (e.g., inventory) and the proceeds are collateral in which a security interest may be perfected by filing in the office where the financing statement has been filed (e.g., equipment). A different rule applies if the proceeds are acquired with cash proceeds, as is the case if the original collateral (inventory) is sold for cash (cash proceeds) that is used to purchase equipment (proceeds). Under these circumstances, the security interest in the equipment proceeds remains perfected only if the description in the filed financing indicates the type of property constituting the proceeds (e.g., “equipment”).

This section reaches the same result but takes a different approach. It recognizes that the treatment of proceeds acquired with cash proceeds under former Section 9-306(3)(a) essentially was superfluous. In the example, had the filing covered “equipment” as well as “inventory,” the security interest in the proceeds would have been perfected under the usual rules governing after-acquired equipment (see former Sections 9-302, 9-303); paragraph (3)(a) added only an exception to the general rule. Subsection (d)(1)(C) of this section takes a more direct approach. It makes the general rule of continued perfection inapplicable to proceeds acquired with cash proceeds, leaving perfection of a security interest in those proceeds to the generally applicable perfection rules under subsection (d)(3).

Example 1: Lender perfects a security interest in Debtor’s inventory by filing a financing statement covering “inventory.” Debtor sells the inventory and deposits the buyer’s check into a deposit account. Debtor draws a check on the deposit account and uses it to pay for equipment. Under the “lowest intermediate balance rule,” which is a permitted method of tracing in the relevant jurisdiction, see Comment 3, the funds used to pay for the equipment were identifiable proceeds of the inventory. Because the proceeds (equipment) were acquired with cash proceeds (deposit account), subsection (d)(1) does not extend

perfection beyond the 20-day automatic period.

Example 2: Lender perfects a security interest in Debtor's inventory by filing a financing statement covering "all debtor's property." As in Example 1, Debtor sells the inventory, deposits the buyer's check into a deposit account, draws a check on the deposit account, and uses the check to pay for equipment. Under the "lowest intermediate balance rule," which is a permitted method of tracing in the relevant jurisdiction, see Comment 3, the funds used to pay for the equipment were identifiable proceeds of the inventory. Because the proceeds (equipment) were acquired with cash proceeds (deposit account), subsection (d)(1) does not extend perfection beyond the 20-day automatic period. However, because the financing statement is sufficient to perfect a security interest in debtor's equipment, under subsection (d)(3) the security interest in the equipment proceeds remains perfected beyond the 20-day period.

6. Automatic Perfection in Proceeds: Lapse or Termination of Financing Statement During 20-Day Period; Perfection Under Other Statute or Treaty. Subsection (e) provides that a security interest in proceeds perfected under subsection (d)(1) ceases to be perfected when the financing statement covering the original collateral lapses or is terminated. If the lapse or termination occurs before the 21st day after the security interest attaches, however, the security interest in the proceeds remains perfected until the 21st day. Section 9-311(b) provides that compliance with the perfection requirements of a statute or treaty described in Section 9-311(a) "is equivalent to the filing of a financing statement." It follows that collateral subject to a security interest perfected by such compliance under Section 9-311(b) is covered by a "filed financing statement" within the meaning of Section 9-315(d) and (e).

7. Automatic Perfection in Proceeds: Continuation of Perfection in Cash Proceeds. Former Section 9-306(3)(b) provided that if a filed financing statement covered

original collateral, a security interest in identifiable cash proceeds of the collateral remained perfected beyond the ten-day period of automatic perfection. Former Section 9-306(3)(c) contained a similar rule with respect to identifiable cash proceeds of investment property. Subsection (d)(2) extends the benefits of former Sections 9-306(3)(b) and (3)(c) to identifiable cash proceeds of all types of original collateral in which a security interest is perfected by any method. Under subsection (d)(2), if the security interest in the original collateral was perfected, a security interest in identifiable cash proceeds will remain perfected indefinitely, regardless of whether the security interest in the original collateral remains perfected. In many cases, however, a purchaser or other transferee of the cash proceeds will take free of the perfected security interest. See, e.g., Sections 9-330(d) (purchaser of check), 9-331 (holder in due course of check), 9-332 (transferee of money or funds from a deposit account).

8. Insolvency Proceedings; Returned and Repossessed Goods. This Article deletes former Section 9-306(4), which dealt with proceeds in insolvency proceedings. Except as otherwise provided by the Bankruptcy Code, the debtor's entering into bankruptcy does not affect a secured party's right to proceeds.

This Article also deletes former Section 9-306(5), which dealt with returned and repossessed goods. Section 9-330, Comments 9 to 11 explain and clarify the application of priority rules to returned and repossessed goods as proceeds of chattel paper.

9. Proceeds of Collateral Subject to Agricultural Lien. This Article does not determine whether a lien extends to proceeds of farm products encumbered by an agricultural lien. If, however, the proceeds are themselves farm products on which an "agricultural lien" (defined in Section 9-102) arises under other law, then the agricultural-lien provisions of this Article apply to the agricultural lien on the proceeds in the same way in which they would apply had the farm products not been proceeds.

28-9-316. Effect of change in governing law. — (a) A security interest perfected pursuant to the law of the jurisdiction designated in section 28-9-301(1) or 28-9-305(c), Idaho Code, remains perfected until the earliest of:

- (1) The time perfection would have ceased under the law of that jurisdiction;
- (2) The expiration of four (4) months after a change of the debtor's location to another jurisdiction; or
- (3) The expiration of one (1) year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(b) If a security interest described in subsection (a) of this section becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if:

- (1) The collateral is located in one (1) jurisdiction and subject to a security interest perfected under the law of that jurisdiction;
- (2) Thereafter the collateral is brought into another jurisdiction; and
- (3) Upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

(d) Except as otherwise provided in subsection (e) of this section, a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this state remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) A security interest described in subsection (d) of this section becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under section 28-9-311(b) or 28-9-313, Idaho Code, are not satisfied before the earlier of:

- (1) The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from this state; or
- (2) The expiration of four (4) months after the goods had become so covered.

(f) A security interest in deposit accounts, letter of credit rights, or investment property which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

- (1) The time the security interest would have become unperfected under the law of that jurisdiction; or
- (2) The expiration of four (4) months after a change of the applicable jurisdiction to another jurisdiction.

(g) If a security interest described in subsection (f) of this section becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(h) The following rules apply to collateral to which a security interest

attaches within four (4) months after the debtor changes its location to another jurisdiction:

(1) A financing statement filed before the change pursuant to the law of the jurisdiction designated in section 28-9-301(1) or 28-9-305(c), Idaho Code, is effective to perfect a security interest in the collateral if the financing statement would have been effective to perfect a security interest in the collateral if the debtor had not changed its location.

(2) If a security interest that is perfected by a financing statement that is effective under paragraph (1) of this subsection becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in section 28-9-301(1) or 28-9-305(c), Idaho Code, or the expiration of the four (4) month period, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(i) If a financing statement naming an original debtor is filed pursuant to the law of the jurisdiction designated in section 28-9-301(1) or 28-9-305(c), Idaho Code, and the new debtor is located in another jurisdiction, the following rules apply:

(1) The financing statement is effective to perfect a security interest in collateral in which the new debtor has or acquires rights before or within four (4) months after the new debtor becomes bound under section 28-9-203(d), Idaho Code, if the financing statement would have been effective to perfect a security interest in the collateral if the collateral had been acquired by the original debtor.

(2) A security interest that is perfected by the financing statement and that becomes perfected under the law of the other jurisdiction before the earlier of the expiration of the four (4) month period or the time the financing statement would have become ineffective under the law of the jurisdiction designated in section 28-9-301(1) or 28-9-305(c), Idaho Code, remains perfected thereafter. A security interest that is perfected by the financing statement but that does not become perfected under the law of the other jurisdiction before the earlier time or event becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

History.

I.C., § 28-9-316, as added by 2001, ch. 208,
§ 2, p. 704; am. 2012, ch. 145, § 5, p. 381.

STATUTORY NOTES

Prior Laws.

Former § 28-9-316, which comprised 1967, ch. 161, § 9-316, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

tuted "Effect of change" for "Continued perfection of security interest following change" in the section heading and added subsections (h) and (i).

Amendments.

The 2012 amendment, by ch. 145, substi-

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided

that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS

Cited in: *Gugino v. Wachovia Dealer Servs.* (In re Owen), 2009 Bankr. LEXIS 3318 (Bankr. D. Idaho July 15, 2009).

OFFICIAL COMMENT

1. **Source.** Former Section 9-103(1)(d), (2)(b), (3)(e), as modified.

2. **Continued Perfection.** Subsections (a) through (g) deal with continued perfection of security interests that have been perfected under the law of another jurisdiction. The fact that the law of a particular jurisdiction ceases to govern perfection under Sections 9-301 through 9-307 does not necessarily mean that a security interest perfected under that law automatically becomes unperfected. To the contrary: This section generally provides that a security interest perfected under the law of one jurisdiction remains perfected for a fixed period of time (four months or one year, depending on the circumstances), even though the jurisdiction whose law governs perfection changes. However, cessation of perfection under the law of the original jurisdiction cuts short the fixed period. The four-month and one-year periods are long enough for a secured party to discover in most cases that the law of a different jurisdiction governs perfection and to reperfect (typically by filing) under the law of that jurisdiction. If a secured party properly reperfects a security interest before it becomes unperfected under subsection (a), then the security interest remains perfected continuously thereafter. See subsection (b).

Example 1: Debtor is a general partnership whose chief executive office is in Pennsylvania. Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania on May 15, 2002. On April 1, 2005, without Lender's knowledge, Debtor moves its chief executive office to New Jersey. Lender's security interest remains perfected for four months after the move. See subsection (a)(2).

Example 2: Debtor is a general partnership whose chief executive office is in Pennsylvania. Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania on May 15, 2002. On April 1, 2007, without Lender's knowledge, Debtor moves its chief executive office to New Jersey. Lender's security interest remains perfected only through May 14, 2007, when the effectiveness of the filed financing statement lapses. See subsection (a)(1). Although, under these facts, Lender would have only a short period of time to discover that Debtor had relocated and to

reperfect under New Jersey law, Lender could have protected itself by filing a continuation statement in Pennsylvania before Debtor relocated. By doing so, Lender would have prevented lapse and allowed itself the full four months to discover Debtor's new location and refile there or, if Debtor is in default, to perfect by taking possession of the equipment.

Example 3: Under the facts of Example 2, Lender files a financing statement in New Jersey before the effectiveness of the Pennsylvania financing statement lapses. Under subsection (b), Lender's security interest is continuously perfected beyond May 14, 2007, for a period determined by New Jersey's Article 9.

Subsection (a)(3) allows a one-year period in which to reperfect. The longer period is necessary, because, even with the exercise of due diligence, the secured party may be unable to discover that the collateral has been transferred to a person located in another jurisdiction. In any event, the period is cut short if the financing statement becomes ineffective under the law of the jurisdiction in which it is filed.

Example 4: Debtor is a Pennsylvania corporation. On January 1, Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania. Debtor's shareholders decide to "reincorporate" in Delaware. On March 1, they form a Delaware corporation (Newcorp) into which they merge Debtor. The merger effectuates a transfer of the collateral from Debtor to Newcorp, which thereby becomes a debtor and is located in another jurisdiction. Under subsection (a)(3), the security interest remains perfected for one year after the merger. If a financing statement is filed in Delaware against Newcorp within the year following the merger, then the security interest remains perfected thereafter for a period determined by Delaware's Article 9. Note that although Newcorp is a "new debtor" as defined in Section 9-102, the application of subsection (a)(3) is not limited to transferees who are new debtors. Note also that, under Section 9-507, the financing statement naming Debtor remains effective even though Newcorp has become the debtor.

Subsection (a) addresses security interests that are perfected (i.e., that have attached

and as to which any required perfection step has been taken) before the debtor changes its location. Subsection (h) applies to security interests that have not attached before the location changes. See Comment 7.

3. Retroactive Unperfection. Subsection (b) sets forth the consequences of the failure to reperfect before perfection ceases under subsection (a): the security interest becomes unperfected prospectively and, as against purchasers for value, including buyers and secured parties, but not as against donees or lien creditors, retroactively. The rule applies to agricultural liens, as well. See also Section 9-515 (taking the same approach with respect to lapse). Although this approach creates the potential for circular priorities, the alternative-retroactive unperfection against lien creditors — would create substantial and unjustifiable preference risks.

Example 5: Under the facts of Example 4, six months after the merger, Buyer bought from Newcorp some equipment formerly owned by Debtor. At the time of the purchase, Buyer took subject to Lender's perfected security interest, of which Buyer was unaware. See Section 9-315(a)(1). However, subsection (b) provides that if Lender fails to reperfect in Delaware within a year after the merger, its security interest becomes unperfected and is deemed never to have been perfected against Buyer. Having given value and received delivery of the equipment without knowledge of the security interest and before it was perfected, Buyer would take free of the security interest. See Section 9-317(b).

Example 6: Under the facts of Example 4, one month before the merger, Debtor created a security interest in certain equipment in favor of Financer, who perfected by filing in Pennsylvania. At that time, Financer's security interest is subordinate to Lender's. See Section 9-322(a)(1). Financer reperfects by filing in Delaware within a year after the merger, but Lender fails to do so. Under subsection (b), Lender's security interest is deemed never to have been perfected against Financer, a purchaser for value. Consequently, under Section 9-322(a)(2), Financer's security interest is now senior.

Of course, the expiration of the time period specified in subsection (a) does not of itself prevent the secured party from later reperfecting under the law of the new jurisdiction. If the secured party does so, however, there will be a gap in perfection, and the secured party may lose priority as a result. Thus, in Example 6, if Lender perfects by filing in Delaware more than one year under the merger, it will have a new date of filing and perfection for purposes of Section 9-322(a)(1). Financer's security interest, whose perfection dates back to the filing in

Pennsylvania under subsection (b), will remain senior.

4. Possessory Security Interests. Subsection (c) deals with continued perfection of possessory security interests. It applies not only to security interests perfected solely by the secured party's having taken possession of the collateral. It also applies to security interests perfected by a method that includes as an element of perfection the secured party's having taken possession, such as perfection by taking delivery of a certificated security in registered form, see Section 9-313(a), and perfection by obtaining control over a certificated security. See Section 9-314(a).

5. Goods Covered by Certificate of Title. Subsections (d) and (e) address continued perfection of a security interest in goods covered by a certificate of title. The following examples explain the operation of those subsections.

Example 7: Debtor's automobile is covered by a certificate of title issued by Illinois. Lender perfects a security interest in the automobile by complying with Illinois' certificate-of-title statute. Thereafter, Debtor applies for a certificate of title in Indiana. Six months thereafter, Creditor acquires a judicial lien on the automobile. Under Section 9-303(b), Illinois law ceases to govern perfection; rather, once Debtor delivers the application and applicable fee to the appropriate Indiana authority, Indiana law governs. Nevertheless, under Indiana's Section 9-316(d), Lender's security interest remains perfected until it would become unperfected under Illinois law had no certificate of title been issued by Indiana. (For example, Illinois' certificate-of-title statute may provide that the surrender of an Illinois certificate of title in connection with the issuance of a certificate of title by another jurisdiction causes a security interest noted thereon to become unperfected.) If Lender's security interest remains perfected, it is senior to Creditor's judicial lien.

Example 8: Under the facts in Example 7, five months after Debtor applies for an Indiana certificate of title, Debtor sells the automobile to Buyer. Under subsection (e)(2), because Lender did not reperfect within the four months after the goods became covered by the Indiana certificate of title, Lender's security interest is deemed never to have been perfected against Buyer. Under Section 9-317(b), Buyer is likely to take free of the security interest. Lender could have protected itself by perfecting its security interest either under Indiana's certificate-of-title statute, see Section 9-311, or, if it had a right to do so under an agreement or Section 9-609, by taking possession of the automobile. See Section 9-313(b).

The results in Examples 7 and 8 do not depend on the fact that the original perfection

was achieved by notation on a certificate of title. Subsection (d) applies regardless of the method by which a security interest is perfected under the law of another jurisdiction when the goods became covered by a certificate of title from this State.

Section 9-337 affords protection to a limited class of persons buying or acquiring a security interest in the goods while a security interest is perfected under the law of another jurisdiction but after this State has issued a clean certificate of title.

6. Deposit Accounts, Letter-of-Credit Rights, and Investment Property. Subsections (f) and (g) address changes in the jurisdiction of a bank, issuer of an uncertificated security, issuer of or nominated person under a letter of credit, securities intermediary, and commodity intermediary. The provisions are analogous to those of subsections (a) and (b).

7. Security Interests that Attach after Debtor Changes Location. In contrast to subsections (a) and (b), which address security interests that are perfected (i.e., that have attached and as to which any required perfection step has been taken) before the debtor changes its location, subsection (h) addresses security interests that attach within four months after the debtor changes its location. Under subsection (h), a filed financing statement that would have been effective to perfect a security interest in the collateral if the debtor had not changed its location is effective to perfect a security interest in collateral acquired within four months after the relocation.

Example 9: Debtor, an individual whose principal residence is in Pennsylvania, grants to Lender a security interest in Debtor's existing and after-acquired inventory. Lender perfects the security interest by filing a proper financing statement in Pennsylvania on January 2, 2014. On March 31, 2014, Debtor's principal residence is relocated to New Jersey. Upon the relocation, New Jersey law governs perfection of a security interest in Debtor's inventory. See Sections 9-301, 9-307. Under New Jersey's Section 9-316(a), Lender's security interest in Debtor's inventory on hand at the time of the relocation remains perfected for four months thereafter. Had Debtor not relocated, the financing statement filed in Pennsylvania would have been effective to perfect Lender's security interest in inventory acquired by Debtor after March 31, 2014. Accordingly, under subsection (h), the financing statement is effective to perfect Lender's security interest in inventory that Debtor acquires within the four months after Debtor's location changed.

In Example 9, Lender's security interest in the inventory acquired within the four months after Debtor's relocation will be perfected when it attaches. It will remain per-

fectured if, before the expiration of the four-month period, the security interest is perfected under the law of New Jersey. Otherwise, the security interest will become unperfected at the end of the four-month period and will be deemed never to have been perfected as against a purchaser for value. See subsection (h)(2).

8. Collateral Acquired by New Debtor. Subsection (i) is similar to subsection (h). Whereas subsection (h) addresses security interests that attach within four months after a debtor changes its location, subsection (i) addresses security interests that attach within four months after a new debtor becomes bound as debtor by a security agreement entered into by another person. Subsection (i) also addresses collateral acquired by the new debtor before it becomes bound.

Example 10: Debtor, a Pennsylvania corporation, grants to Lender a security interest in Debtor's existing and after-acquired inventory. Lender perfects the security interest by filing a proper financing statement in Pennsylvania on January 2, 2014. On March 31, 2014, Debtor merges into Survivor, a Delaware corporation. Because Survivor is located in Delaware, Delaware law governs perfection of a security interest in Survivor's inventory. See Sections 9-301, 9-307. Under Delaware's Section 9-316(a), Lender's security interest in the inventory that Survivor acquired from Debtor remains perfected for one year after the transfer. See Comment 2. By virtue of the merger, Survivor becomes bound as debtor by Debtor's security agreement. See Section 9-203(d). As a consequence, Lender's security interest attaches to all of Survivor's inventory under Section 9-203, and Lender's collateral now includes inventory in which Debtor never had an interest. The financing statement filed in Pennsylvania against Debtor is effective under Delaware's Section 9-316(i) to perfect Lender's security interest in inventory that Survivor acquired before, and within the four months after, becoming bound as debtor by Debtor's security agreement. This is because the financing statement filed in Pennsylvania would have been effective to perfect Lender's security interest in this collateral had Debtor, rather than Survivor, acquired it.

If the financing statement is effective, Lender's security interest in the collateral that Survivor acquired before, and within four months after, Survivor became bound as debtor will be perfected upon attachment. It will remain perfected if, before the expiration of the four-month period, the security interest is perfected under Delaware law. Otherwise, the security interest will become unperfected at the end of the four-month period and will be deemed never to have been perfected as against a purchaser for value.

Section 9-325 contains special rules governing the priority of competing security interests in collateral that is transferred, by merger or otherwise, to a new debtor or other person who becomes a debtor with respect to the collateral. Section 9-326 contains special rules governing the priority of competing security interests in collateral acquired by a new debtor other than by transfer from the original debtor.

9. **Agricultural Liens.** This section does not apply to agricultural liens.

Example 11: Supplier holds an agricul-

tural lien on corn. The lien arises under an Iowa statute. Supplier perfects by filing a financing statement in Iowa, where the corn is located. See Section 9-302. Debtor stores the corn in Missouri. Assume the Iowa agricultural lien survives or an agricultural lien arises under Missouri law (matters that this Article does not govern). Once the corn is located in Missouri, Missouri becomes the jurisdiction whose law governs perfection. See Section 9-302. Thus, the agricultural lien will not be perfected unless Supplier files a financing statement in Missouri.

28-9-317. Interests that take priority over or take free of security interest or agricultural lien. — (a) A security interest or agricultural lien is subordinate to the rights of:

- (1) A person entitled to priority under section 28-9-322, Idaho Code; and
- (2) Except as otherwise provided in subsection (e) of this section, a person that becomes a lien creditor before the earlier of the time:

(A) the security interest or agricultural lien is perfected; or

(B) one (1) of the conditions specified in section 28-9-203(b)(3), Idaho Code, is met and a financing statement covering the collateral is filed.

(b) Except as otherwise provided in subsection (e) of this section, a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments or a certificated security takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) Except as otherwise provided in subsection (e) of this section, a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) A licensee of a general intangible or a buyer, other than a secured party, of collateral other than tangible chattel paper, tangible documents, goods, instruments or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) Except as otherwise provided in sections 28-9-320 and 28-9-321, Idaho Code, if a person files a financing statement with respect to a purchase-money security interest before or within twenty (20) days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

History.

I.C., § 28-9-317, as added by 2001, ch. 208,

§ 2, p. 704; am. 2004, ch. 42, § 30, p. 77; am. 2012, ch. 145, § 6, p. 381.

STATUTORY NOTES

Prior Laws.

Former § 28-9-317, which comprised 1967,

ch. 161, § 9-317, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2012 amendment, by ch. 145, substituted “of collateral other than tangible chattel paper, tangible documents, goods, instruments or” for “of accounts, electronic chattel paper, electronic documents, general intangibles, or investment property other than” in subsection (d).

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-301, 2A-307(2).

2. **Scope of This Section.** As did former Section 9-301, this section lists the classes of persons who take priority over, or take free of, an unperfected security interest. Section 9-308 explains when a security interest or agricultural lien is “perfected.” A security interest that has attached (see Section 9-203) but as to which a required perfection step has not been taken is “unperfected.” Certain provisions have been moved from former Section 9-301. The definition of “lien creditor” now appears in Section 9-102, and the rules governing priority in future advances are found in Section 9-323.

3. **Competing Security Interests.** Section 9-322 states general rules for determining priority among conflicting security interests and refers to other sections that state special rules of priority in a variety of situations. The security interests given priority under Section 9-322 and the other sections to which it refers take priority in general even over a perfected security interest. *A fortiori* they take priority over an unperfected security interest.

4. **Filed but Unattached Security Interest vs. Lien Creditor.** Under former Section 9-301(1)(b), a lien creditor’s rights had priority over an unperfected security interest. Perfection required attachment (former Section 9-303), and attachment required the giving of value (former Section 9-203). It followed that, if a secured party had filed a financing statement but the debtor had not entered into a security agreement and value had not yet been given, an intervening lien creditor whose lien arose after filing but before attachment of the security interest acquired rights that are senior to those of the secured party who later gives value. This result comported with the *nemo dat* concept: When the security interest attached, the collateral was already subject to the judicial lien.

On the other hand, this approach treated the first secured advance differently from all other advances, even in circumstances in which a security agreement covering the collateral had been entered into before the judicial lien attached. The special rule for future advances in former Section 9-301(4) (substan-

tially reproduced in Section 9-323(b)) afforded priority to a discretionary advance made by a secured party within 45 days after the lien creditor’s rights arose as long as the secured party was “perfected” when the lien creditor’s lien arose i.e., as long as the advance was not the first one and an earlier advance had been made.

Subsection (a)(2) revises former Section 9-301(1)(b) and, in appropriate cases, treats the first advance the same as subsequent advances. More specifically, a judicial lien that arises after the security-agreement condition of Section 9-203(b)(3) is satisfied and a financing statement is filed, but before the security interest attaches and becomes perfected is subordinate to all advances secured by the security interest, even the first advance, except as otherwise provided in Section 9-323(b). However, if the security interest becomes unperfected (e.g., because the effectiveness of the filed financing statement lapses) before the judicial lien arises, the security interest is subordinate. If a financing statement is filed but a security interest does not attach, then no priority contest arises. The lien creditor has the only enforceable claim to the property.

5. **Security Interest of Consignor or Receivables Buyer vs. Lien Creditor.** Section 1-201(b)(35) defines “security interest” to include the interest of most true consignors of goods and the interest of most buyers of certain receivables (accounts, chattel paper, payment intangibles, and promissory notes). A consignee of goods or a seller of accounts or chattel paper each is deemed to have rights in the collateral which a lien creditor may reach, as long as the competing security interest of the consignor or buyer is unperfected. This is so even though, as between the consignor and the debtor-consignee, the latter has only limited rights, and, as between the buyer and debtor-seller, the latter does not have any rights in the collateral. See Sections 9-318 (seller), 9-319 (consignee). Security interests arising from sales of payment intangibles and promissory notes are automatically perfected. See Section 9-309. Accordingly, a subsequent judicial lien always would be subordinate to the rights of a buyer of those types of receivables.

6. Purchasers Other Than Secured Parties. Subsections (b), (c), and (d) afford priority over an unperfected security interest to certain purchasers (other than secured parties) of collateral. They derive from former Sections 9-301(1)(c), 2A-307(2), and 9-301(d). Former Section 9-301(1)(c) and (1)(d) provided that unperfected security interests are “subordinate” to the rights of certain purchasers. But, as former Comment 9 suggested, the practical effect of subordination in this context is that the purchaser takes free of the security interest. To avoid any possible misinterpretation, subsections (b) and (d) of this section use the phrase “takes free.”

Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (tangible chattel paper, documents, instruments, and security certificates). To obtain priority, a buyer must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection. Even if the buyer gave value without knowledge and before perfection, the buyer would take subject to the security interest if perfection occurred before physical delivery of the collateral to the buyer. Subsection (c) contains a similar rule with respect to lessees of goods. Note that a lessee of goods in ordinary course of business takes free of all security interests created by the lessor, even if perfected. See Section 9-321.

Normally, there will be no question when a buyer of chattel paper, documents, instruments, or security certificates “receives delivery” of the property. See Section 1-201 (defining “delivery”). However, sometimes a buyer or lessee of goods, such as complex machinery, takes delivery of the goods in stages and completes assembly at its own location. Under those circumstances, the buyer or lessee “receives delivery” within the meaning of subsections (b) and (c) when, after an inspection of the portion of the goods remaining with the seller or lessor, it would be apparent to a potential lender to the seller or lessor that another person might have an interest in the goods.

The rule of subsection (b) obviously is not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer.

Therefore, with respect to such intangibles (including accounts, electronic chattel paper, electronic documents, general intangibles, and investment property other than certificated securities), subsection (d) gives priority to any buyer who gives value without knowledge, and before perfection, of the security interest. A licensee of a general intangible takes free of an unperfected security interest in the general intangible under the same circumstances. Note that a licensee of a general intangible in ordinary course of business takes rights under a nonexclusive license free of security interests created by the licensor, even if perfected. See Section 9-321.

Unless Section 9-109 excludes the transaction from this Article, a buyer of accounts, chattel paper, payment intangibles, or promissory notes is a “secured party” (defined in Section 9-102), and subsections (b) and (d) do not determine priority of the security interest created by the sale. Rather, the priority rules generally applicable to competing security interests apply. See Section 9-322.

7. Agricultural Liens. Subsections (a), (b), and (c) subordinate unperfected agricultural liens in the same manner in which they subordinate unperfected security interests.

8. Purchase-Money Security Interests. Subsection (e) derives from former Section 9-301(2). It provides that, if a purchase-money security interest is perfected by filing no later than 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of buyers, lessees, or lien creditors which arise between the time the security interest attaches and the time of filing. Subsection (e) differs from former Section 9-301(2) in two significant respects. First, subsection (e) protects a purchase-money security interest against all buyers and lessees, not just against transferees in bulk. Second, subsection (e) conditions this protection on filing within 20, as opposed to ten, days after delivery.

Section 9-311(b) provides that compliance with the perfection requirements of a statute or treaty described in Section 9-311(a) “is equivalent to the filing of a financing statement.” It follows that a person who perfects a security interest in goods covered by a certificate of title by complying with the perfection requirements of an applicable certificate-of-title statute “files a financing statement” within the meaning of subsection (e).

28-9-318. No interest retained in right to payment that is sold — Rights and title of seller of account or chattel paper with respect to creditors and purchasers. — (a) A debtor that has sold an account, chattel paper, payment intangible or promissory note does not retain a legal or equitable interest in the collateral sold.

(b) For purposes of determining the rights of creditors of, and purchasers

for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold.

History.

I.C., § 28-9-318, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-318, which comprised 1967, ch. 161, § 9-318, p. 351; am. 1979, ch. 299,

§ 27, p. 781, was repealed by S.L. 2001, ch. 208, § 1.

OFFICIAL COMMENT

1. Source. New.

2. Sellers of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes. Section 1-201(b)(35) defines "security interest" to include the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory notes. See also Section 9-109(a) and Comment 5. Subsection (a) makes explicit what was implicit, but perfectly obvious, under former Article 9: The fact that a sale of an account or chattel paper gives rise to a "security interest" does not imply that the seller retains an interest in the property that has been sold. To the contrary, a seller of an account or chattel paper retains no interest whatsoever in the property to the extent that it has been sold. Subsection (a) also applies to sales of payment intangibles and promissory notes, transactions that were not covered by former Article 9. Neither this Article nor the definition of "security interest" in Section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation.

3. Buyers of Accounts and Chattel Paper. Another aspect of sales of accounts and chattel paper also was implicit, and equally obvious, under former Article 9: If the buyer's security interest is unperfected, then for purposes of determining the rights of certain third parties, the seller (debtor) is deemed to have all rights and title that the seller sold. The seller is deemed to have these rights even though, as between the parties, it has sold all its rights to the buyer. Subsection (b) makes this explicit. As a consequence of subsection (b), if the buyer's security interest is unperfected, the seller can transfer, and the

creditors of the seller can reach, the account or chattel paper as if it had not been sold.

Example: Debtor sells accounts or chattel paper to Buyer-1 and retains no interest in them. Buyer-1 does not file a financing statement. Debtor then sells the same receivables to Buyer-2. Buyer-2 files a proper financing statement. Having sold the receivables to Buyer-1, Debtor would not have any rights in the collateral so as to permit Buyer-2's security (ownership) interest to attach. Nevertheless, under this section, for purposes of determining the rights of purchasers for value from Debtor, Debtor is deemed to have the rights that Debtor sold. Accordingly, Buyer-2's security interest attaches, is perfected by the filing, and, under Section 9-322, is senior to Buyer-1's interest.

4. Effect of Perfection. If the security interest of a buyer of accounts or chattel paper is perfected the usual result would take effect: transferees from and creditors of the seller could not acquire an interest in the sold accounts or chattel paper. The same result generally would occur if payment intangibles or promissory notes were sold, inasmuch as the buyer's security interest is automatically perfected under Section 9-309. However, in certain circumstances a purchaser who takes possession of a promissory note will achieve priority, under Sections 9-330 or 9-331, over the security interest of an earlier buyer of the promissory note. It necessarily follows that the seller in those circumstances retains the power to transfer the promissory note, as if it had not been sold, to a purchaser who obtains priority under either of those sections. See Section 9-203(b)(3), Comment 6.

28-9-319. Rights and title of consignee with respect to creditors and purchasers. — (a) Except as otherwise provided in subsection (b) of this section, for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the

possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

(b) For purposes of determining the rights of a creditor of a consignee, law other than this chapter determines the rights and title of a consignee while goods are in the consignee's possession if, under this part, a perfected security interest held by the consignor would have priority over the rights of the creditor.

History.

I.C., § 28-9-319, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after
July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. **Consignments.** This section takes an approach to consignments similar to that taken by Section 9-318 with respect to buyers of accounts and chattel paper. Revised Section 1-201(b)(35) defines "security interest" to include the interest of a consignor of goods under many true consignments. Section 9-319(a) provides that, for purposes of determining the rights of certain third parties, the consignee is deemed to acquire all rights and title that the consignor had, if the consignor's security interest is unperfected. The consignee acquires these rights even though, as between the parties, it purchases a limited interest in the goods (as would be the case in a true consignment, under which the consignee acquires only the interest of a bailee). As a consequence of this section, creditors of the consignee can acquire judicial liens and security interests in the goods.

Insofar as creditors of the consignee are concerned, this Article to a considerable extent reformulates the former law, which appeared in former Sections 2-326 and 9-114, without changing the results. However, neither Article 2 nor former Article 9 specifically addresses the rights of non-ordinary course buyers from the consignee. Former Section 9-114 contained priority rules applicable to security interests in consigned goods. Under this Article, the priority rules for purchase-money security interests in inventory apply to consignments. See Section 9-103(d). Accordingly, a special section containing priority rules for consignments no longer is needed. Section 9-317 determines whether the rights of a judicial lien creditor are senior to the interest of the consignor, Sections 9-322 and 9-324 govern competing security interests in consigned goods, and Sections 9-317, 9-315,

and 9-320 determine whether a buyer takes free of the consignor's interest.

The following example explains the operation of this section:

Example 1: SP-1 delivers goods to Debtor in a transaction constituting a "consignment" as defined in Section 9-102. SP-1 does not file a financing statement. Debtor then grants a security interest in the goods to SP-2. SP-2 files a proper financing statement. Assuming Debtor is a mere bailee, as in a "true" consignment, Debtor would not have any rights in the collateral (beyond those of a bailee) so as to permit SP-2's security interest to attach to any greater rights. Nevertheless, under this section, for purposes of determining the rights of Debtor's creditors, Debtor is deemed to acquire SP-1's rights. Accordingly, SP-2's security interest attaches, is perfected by the filing, and, under Section 9-322, is senior to SP-1's interest.

3. **Effect of Perfection.** Subsection (b) contains a special rule with respect to consignments that are perfected. If application of this Article would result in the consignor having priority over a competing creditor, then other law determines the rights and title of the consignee.

Example 2: SP-1 delivers goods to Debtor in a transaction constituting a "consignment" as defined in Section 9-102. SP-1 files a proper financing statement. Debtor then grants a security interest in the goods to SP-2. Under Section 9-322, SP-1's security interest is senior to SP-2's. Subsection (b) indicates that, for purposes of determining SP-2's rights, other law determines the rights and title of the consignee. If, for example, a consignee obtains only the special property of a bailee, then SP-2's security interest would attach only to that special property.

Example 3: SP-1 obtains a security interest in all Debtor's existing and after-acquired inventory. SP-1 perfects its security interest with a proper filing. Then SP-2 delivers goods to Debtor in a transaction constituting a "consignment" as defined in Section 9-102. SP-2 files a proper financing statement but does not send notification to SP-1 under Section 9-324(b). Accordingly, SP-2's security interest is junior to SP-1's under Section 9-322(a). Under Section 9-319(a), Debtor is deemed to

have the consignor's rights and title, so that SP-1's security interest attaches to SP-2's ownership interest in the goods. Thereafter, Debtor grants a security interest in the goods to SP-3, and SP-3 perfects by filing. Because SP-2's perfected security interest is senior to SP-3's under Section 9-322(a), Section 9-319(b) applies: Other law determines Debtor's rights and title to the goods insofar as SP-3 is concerned, and SP-3's security interest attaches to those rights.

28-9-320. Buyer of goods. — (a) Except as otherwise provided in subsection (e) of this section, a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence. A buyer who, in the ordinary course of business, buys farm products from a person engaged in farming operations or a commission merchant or selling agent who in the ordinary course of business sells farm products for a person engaged in farming operations shall take and sell free of a security interest created by his seller, even though the security interest is perfected and the buyer or commission merchant or selling agent knows of the existence of such interest, if he has registered with the secretary of state pursuant to section 28-9-523(h)[, Idaho Code,] and the security interest is not listed on the most recent master list or cumulative supplement distributed by the secretary of state pursuant to section 28-9-523(i)[, Idaho Code], unless he has received written notification, as that term is used in applicable federal law and regulation, of the security interest from the secretary of state, his seller or the secured party.

(b) Except as otherwise provided in subsection (e) of this section, a buyer of goods from a person who used or bought the goods for use primarily for personal, family or household purposes takes free of a security interest, even if perfected, if the buyer buys:

- (1) Without knowledge of the security interest;
- (2) For value;
- (3) Primarily for the buyer's personal, family or household purposes; and
- (4) Before the filing of a financing statement covering the goods.

(c) To the extent that it affects the priority of a security interest over a buyer of goods under subsection (b) of this section, the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by section 28-9-316(a) and (b)[, Idaho Code].

(d) A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.

(e) Subsections (a) and (b) of this section do not affect a security interest in goods in the possession of the secured party under section 28-9-313.

History.

I.C., § 28-9-320, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (a), (c), and (e) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Buyer.

Farm products.

Right of mortgagee to sell.

Trust receipts.

Buyer.

It is clear that an auctioneer is not a "buyer" who has the protection of this section. *Newgen v. OK Livestock Exch.*, 117 Idaho 445, 788 P.2d 846 (Ct. App. 1990).

Farm Products.

Where secured party authorized sale of grain to insolvent buyer, subsequent purchaser took free of the security interest. *Western Idaho Prod. Credit Ass'n v. Simplot Feed Lots, Inc.*, 106 Idaho 260, 678 P.2d 52 (1984).

Right of Mortgagee to Sell.

Mortgage upon stock of goods remaining in hands of mortgagor with power to dispose of the same was void as to third parties. In re *Hickerson*, 162 F. 345 (D. Idaho 1908).

While mortgage on a stock of goods which permitted mortgagor to remain in the full and free use and enjoyment of the same was void in that it permitted him to sell the goods in the usual course of trade, yet such a mortgage was valid when it covered wood corded and standing in forest where it had been cut. *Meyer v. Munro*, 9 Idaho 46, 71 P. 969 (1903).

Trust Receipts.

Holder of trust receipt on car sold by trustee to another dealer was entitled to recognize the sale and pursue its remedy against proceeds of sale deposited in trustee's bank. *Commercial Credit Corp. v. Bosse*, 76 Idaho 409, 283 P.2d 937 (1955).

RESEARCH REFERENCES

Am. Jur. — 15A Am. Jur. 2d, Commercial Code, § 62.

A.L.R. — Who is "person in business of selling goods of that kind" within provision of

UCC § 1-201(9), defining buyer in ordinary course of business for purposes of UCC § 9-307(1). 73 A.L.R.3d 338.

OFFICIAL COMMENT

1. **Source.** Former Section 9-307.

2. **Scope of This Section.** This section states when buyers of goods take free of a security interest even though perfected. Of course, a buyer who takes free of a perfected security interest takes free of an unperfected one. Section 9-317 should be consulted to determine what purchasers, in addition to the buyers covered in this section, take free of an unperfected security interest. Article 2 states general rules on purchase of goods from a seller with defective or voidable title (Section 2-403).

3. **Buyers in Ordinary Course.** Subsection (a) derives from former Section 9-307(1). The definition of "buyer in ordinary course of business" in Section 1-201 restricts its appli-

cation to buyers "from a person, other than a pawnbroker, in the business of selling goods of that kind." Thus subsection (a) applies primarily to inventory collateral. The subsection further excludes from its operation buyers of "farm products" (defined in Section 9-102) from a person engaged in farming operations. The buyer in ordinary course of business is defined as one who buys goods "in good faith, without knowledge that the sale violates the rights of another person and in the ordinary course." Subsection (a) provides that such a buyer takes free of a security interest, even though perfected, and even though the buyer knows the security interest exists. Reading the definition together with the rule of law results in the buyer's taking free if the buyer

merely knows that a security interest covers the goods but taking subject if the buyer knows, in addition, that the sale violates a term in an agreement with the secured party.

As did former Section 9-307(1), subsection (a) applies only to security interests created by the seller of the goods to the buyer in ordinary course. However, under certain circumstances a buyer in ordinary course who buys goods that were encumbered with a security interest created by a person other than the seller may take free of the security interest, as Example 2 explains. See also Comment 6, below.

Example 1: Manufacturer, who is in the business of manufacturing appliances, owns manufacturing equipment subject to a perfected security interest in favor of Lender. Manufacturer sells the equipment to Dealer, who is in the business of buying and selling used equipment. Buyer buys the equipment from Dealer. Even if Buyer qualifies as a buyer in the ordinary course of business, Buyer does not take free of Lender's security interest under subsection (a), because Dealer did not create the security interest; Manufacturer did.

Example 2: Manufacturer, who is in the business of manufacturing appliances, owns manufacturing equipment subject to a perfected security interest in favor of Lender. Manufacturer sells the equipment to Dealer, who is in the business of buying and selling used equipment. Lender learns of the sale but does nothing to assert its security interest. Buyer buys the equipment from Dealer. Inasmuch as Lender's acquiescence constitutes an "entrusting" of the goods to Dealer within the meaning of Section 2-403(3) Buyer takes free of Lender's security interest under Section 2-403(2) if Buyer qualifies as a buyer in ordinary course of business.

4. Buyers of Farm Products. This section does not enable a buyer of farm products to take free of a security interest created by the seller, even if the buyer is a buyer in ordinary course of business. However, a buyer of farm products may take free of a security interest under Section 1324 of the Food Security Act of 1985, 7 U.S.C. § 1631.

5. Buyers of Consumer Goods. Subsection (b), which derives from former Section 9-307(2), deals with buyers of collateral that the debtor-seller holds as "consumer goods" (defined in Section 9-102). Under Section 9-309(1), a purchase-money interest in consumer goods, except goods that are subject to a statute or treaty described in Section 9-311(a) (such as automobiles that are subject to a certificate-of-title statute), is perfected automatically upon attachment. There is no need to file to perfect. Under subsection (b) a buyer of consumer goods takes free of a security interest, even though perfected, if the

buyer buys (1) without knowledge of the security interest, (2) for value, (3) primarily for the buyer's own personal, family, or household purposes, and (4) before a financing statement is filed.

As to purchase money-security interests which are perfected without filing under Section 9-309(1): A secured party may file a financing statement, although filing is not required for perfection. If the secured party does file, all buyers take subject to the security interest. If the secured party does not file, a buyer who meets the qualifications stated in the preceding paragraph takes free of the security interest.

As to security interests for which a perfection step is required: This category includes all non-purchase-money security interests, and all security interests, whether or not purchase-money, in goods subject to a statute or treaty described in Section 9-311(a), such as automobiles covered by a certificate-of-title statute. As long as the required perfection step has not been taken and the security interest remains unperfected, not only the buyers described in subsection (b) but also the purchasers described in Section 9-317 will take free of the security interest. After a financing statement has been filed or the perfection requirements of the applicable certificate-of-title statute have been complied with (compliance is the equivalent of filing a financing statement; see Section 9-311(b)), all subsequent buyers, under the rule of subsection (b), are subject to the security interest.

The rights of a buyer under subsection (b) turn on whether a financing statement has been filed against consumer goods. Occasionally, a debtor changes his or her location after a filing is made. Subsection (c), which derives from former Section 9-103(1)(d)(iii), deals with the continued effectiveness of the filing under those circumstances. It adopts the rules of Sections 9-316(a) and (b). These rules are explained in the Comments to that section.

6. Authorized Dispositions. The limitations that subsections (a) and (b) impose on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party authorized the sale in an express agreement or otherwise, the buyer takes free under Section 9-315(a) without regard to the limitations of this section. (That section also states the right of a secured party to the proceeds of a sale, authorized or unauthorized.) Moreover, the buyer also takes free if the secured party waived or otherwise is precluded from asserting its security interest against the buyer. See Section 1-103.

7. Oil, Gas, and Other Minerals. Under subsection (d), a buyer in ordinary course of business of minerals at the wellhead or

minehead or after extraction takes free of a security interest created by the seller. Specifically, it provides that qualified buyers take free not only of Article 9 security interests but also of interests “arising out of an encumbrance.” As defined in Section 9-102, the term “encumbrance” means “a right, other than an ownership interest, in real property.” Thus, to the extent that a mortgage encumbers minerals not only before but also after extraction, subsection (d) enables a buyer in ordinary course of the minerals to take free of the mortgage. This subsection does not, however, enable these buyers to take free of interests arising out of ownership interests in the real property. This issue is significant only in a minority of states. Several of them have adopted special statutes and nonuniform amendments to Article 9 to provide special protections to mineral owners, whose interests often are highly fractionalized in the case of oil and gas. See Terry I. Cross, *Oil and Gas Product Liens — Statutory Security Interests for Producers and Royalty Owners Under the Statutes of Kansas, New Mexico, Oklahoma,*

Texas and Wyoming, 50 Consumer Fin. L. Q. Rep. 418 (1996). Inasmuch as a complete resolution of the issue would require the addition of complex provisions to this Article, and there are good reasons to believe that a uniform solution would not be feasible, this Article leaves its resolution to other legislation.

8. **Possessory Security Interests.** Subsection (e) is new. It rejects the holding of *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 350 N.E.2d 590 (N.Y. 1976) and, together with Section 9-317(b), prevents a buyer of goods collateral from taking free of a security interest if the collateral is in the possession of the secured party. “The secured party” referred in subsection (e) is the holder of the security interest referred to in subsection (a) or (b). Section 9-313 determines whether a secured party is in possession for purposes of this section. Under some circumstances, Section 9-313 provides that a secured party is in possession of collateral even if the collateral is in the physical possession of a third party.

28-9-321. Licensee of general intangible and lessee of goods in ordinary course of business. — (a) In this section, “licensee in ordinary course of business” means a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor’s own usual or customary practices.

(b) A licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence.

(c) A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence.

History.

I.C., § 28-9-321, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Derived from Sections 2A-103(1)(o), 2A-307(3).

2. **Licensee in Ordinary Course.** Like the analogous rules in Section 9-320(a) with

respect to buyers in ordinary course and subsection (c) with respect to lessees in ordinary course, the new rule in subsection (b) reflects the expectations of the parties and the marketplace: a licensee under a nonexclusive license takes subject to a security interest unless the secured party authorizes the licensee free of the security interest or other, controlling law such as that of this section (protecting ordinary-course licensees) dic-

tates a contrary result. See Sections 9-201, 9-315. The definition of "licensee in ordinary course of business" in subsection (a) is modeled upon that of "buyer in ordinary course of business."

3. **Lessee in Ordinary Course.** Subsection (c) contains the rule formerly found in Section 2A-307(3). The rule works in the same way as that of Section 9-320(a).

28-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral. — (a) Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) For the purposes of subsection (a)(1) of this section:

(1) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) The time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) Except as otherwise provided in subsection (f) of this section, a security interest in collateral which qualifies for priority over a conflicting security interest under section 28-9-327, 28-9-328, 28-9-329, 28-9-330 or 28-9-331 [Idaho Code,] also has priority over a conflicting security interest in:

(1) Any supporting obligation for the collateral; and

(2) Proceeds of the collateral if:

(A) the security interest in proceeds is perfected;

(B) the proceeds are cash proceeds or of the same type as the collateral; and

(C) in the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) Subject to subsection (e) of this section and except as otherwise provided in subsection (f) of this section, if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter of credit rights is perfected by a method other than filing,

conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) Subsection (d) of this section applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property or letter of credit rights.

(f) Subsections (a) through (e) of this section are subject to:

- (1) Subsection (g) of this section and the other provisions of this part;
- (2) Section 28-4-210[, Idaho Code,] with respect to a security interest of a collecting bank;
- (3) Section 28-5-120[, Idaho Code,] with respect to a security interest of an issuer or nominated person; and
- (4) Section 28-9-110[, Idaho Code,] with respect to a security interest arising under chapter 2 or 12[, title 28, Idaho Code].

(g) A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

History.

I.C., § 28-9-322, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in the introductory paragraph in subsection (c) and in paragraphs (f)(2), (f)(3), and (f)(4) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Absence of knowledge.

Crop liens.

Deed of trust.

Growing crops.

Possession.

Proper filing required.

Purchase at foreclosure sale.

Purchase money security interest.

Warehouseman's liens.

Absence of Knowledge.

An examination of the priority and foreclosure scheme of article 9 demonstrates that absence of knowledge of subordinate security interests could not be a prerequisite for a purchaser to buy property free of encumbrances at a foreclosure sale; for, if absence of knowledge were required, the party whose interest would be undermined would be the secured party who was conducting the sale.

Northwest Equip. Sales Co. v. Western Packers, Inc., 623 F.2d 92 (9th Cir. 1980).

Crop Liens.

Creditor 1 took priority over creditor 2 with respect to a security interest arising from a line of credit, due no more than six months prior to the planting of crops, but creditor 2 took priority over creditor 1's security interest relating to a promissory note due and payable

to creditor 1 over a year prior to the crops being planted, where creditor 2 had provided chemicals necessary for the production of the crops. *Tri River Chem. Co. v. TNT Farms*, 226 Bankr. 436 (Bankr. D. Idaho 1998).

Deed of Trust.

Where the small business administration held a security interest in fruit packing machinery under its real estate deed of trust which covered the real property to which the machinery was affixed, and where the SBA had purchased the entire interest of the original mortgagees of the property without knowledge of a purchase money security interest retained by the seller of the machinery, the SBA's interest was prior to the purchase money security interest. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

Growing Crops.

When mortgage on growing crops had been recorded, it was notice to all persons claiming to have acquired rights to crop subsequent to record. *Adams v. Caldwell Milling & Elevator Co.*, 33 Idaho 677, 197 P. 723 (1921).

Prior chattel mortgage on crops to be grown was valid, though given to a third party by lessee of premises on which crops were to be grown, after an agreement between him and lessor to cancel the existing lease, where latter, with notice of such mortgage, permitted lessee to live on and cultivate premises and thereafter entered into a new lease of the premises to lessee. *Bank of Roberts v. Olaveson*, 38 Idaho 223, 221 P. 560 (1923).

Lien of chattel mortgage upon crop to be sown or grown would not attach to crops sown by others, except so far as mortgagor had or retains interests in the crops. *Devereaux Mtg. Co. v. Walker*, 46 Idaho 431, 268 P. 37 (1926); *Lords v. Lava Hot Springs State Bank*, 44 Idaho 316, 356 P. 761 (1927); *Albrethsen v. Clements*, 48 Idaho 80, 279 P. 1097 (1929).

Possession.

"Possession" for the purpose of this section should not be construed to occur at the time when cattle purchasers completed selection of cows to be purchased from seller's herd; the ten-day grace period for filing a financing statement commenced when the security agreement was executed and the purchasers were in possession of all the cows. *Valley Bank v. Estate of Rainsdon*, 117 Idaho 1085, 793 P.2d 1257 (Ct. App. 1990).

Proper Filing Required.

This section exclusively delimits the priority of competing security interests where the facts clearly establish that the security interests have been properly filed, providing that the first interest properly filed holds a superior claim over all other secured and unsecured creditors as a matter of law. *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994).

Purchase at Foreclosure Sale.

Although the seller of various items of fruit packing machinery had retained a security interest to secure the purchase price, a subsequent foreclosure sale of the real property to which the machinery was affixed discharged the security interest held by the seller of the machinery, where the purchase at the foreclosure sale of the real estate and fruit packing machinery was in good faith. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

Purchase Money Security Interest.

Where, because a bank advanced \$12,346 for debtor to pay the first installment of loan made by a third party and secured by certain cows purchased by debtor with the proceeds of the original loan, and where it contends that it acquired the status of a lender with a purchase money security interest, at least in the amount of this advancement, although the money advanced by bank was not used by the debtor to acquire any rights in the cows or the use of them because he already had all the possible rights in the cows he could have, nevertheless, since the bank's general security interest was perfected earlier in time than was that of the third party, accordingly, the third party could not prevail unless: (1) he had the super priority of a purchase money security interest, and this would require that he had filed so as to perfect his purchase money security interest, (2) the bank subordinated its security interest to third party's security interest, or (3) the bank was estopped to assert a prior security interest. *Valley Bank v. Estate of Rainsdon*, 117 Idaho 1085, 793 P.2d 1257 (Ct. App. 1990).

Warehouseman's Liens.

Warehouseman's lien on seed was not effective against equipment manufacturer's security interest in seed since its security interest in the seed was perfected before the seed was delivered to the warehouseman; therefore, the manufacturer's security interest had priority. *Curry Grain Storage, Inc. v. Hesston Corp.*, 120 Idaho 328, 815 P.2d 1068 (1991).

OFFICIAL COMMENT

1. **Source.** Former Section 9-312(5), (6).
2. **Scope of This Section.** In a variety of

situations, two or more people may claim a security interest in the same collateral. This

section states general rules of priority among conflicting security interests. As subsection (f) provides, the general rules in subsections (a) through (e) are subject to the rule in subsection (g) governing perfected agricultural liens and to the other rules in this Part of this Article. Rules that override this section include those applicable to purchase-money security interests (Section 9-324) and those qualifying for special priority in particular types of collateral. See, e.g., Section 9-327 (deposit accounts); Section 9-328 (investment property); Section 9-329 (letter-of-credit rights); Section 9-330 (chattel paper and instruments); Section 9-334 (fixtures). In addition, the general rules of sections (a) through (e) are subject to priority rules governing security interests arising under Articles 2, 2A, 4, and 5.

3. General Rules. Subsection (a) contains three general rules. Subsection (a)(1) governs the priority of competing perfected security interests. Subsection (a)(2) governs the priority of competing security interests if one is perfected and the other is not. Subsection (a)(3) governs the priority of competing unperfected security interests. The rules may be regarded as adaptations of the idea, deeply rooted at common law, of a race of diligence among creditors. The first two rules are based on precedence in the time as of which the competing secured parties either filed their financing statements or obtained perfected security interests. Under subsection (a)(1), the first secured party who files or perfects has priority. Under subsection (a)(2), which is new, a perfected security interest has priority over an unperfected one. Under subsection (a)(3), if both security interests are unperfected, the first to attach has priority. Note that Section 9-709(b) may affect the application of subsection (a) to a filing that occurred before the effective date of this Article and which would be ineffective to perfect a security interest under former Article 9 but effective under this Article.

4. Competing Perfected Security Interests. When there is more than one perfected security interest, the security interests rank according to priority in time of filing or perfection. "Filing," of course, refers to the filing of an effective financing statement. "Perfection" refers to the acquisition of a perfected security interest, i.e., one that has attached and as to which any required perfection step has been taken. See Sections 9-308 and 9-309.

Example 1: On February 1, A files a financing statement covering a certain item of Debtor's equipment. On March 1, B files a financing statement covering the same equipment. On April 1, B makes a loan to Debtor and obtains a security interest in the equipment. On May 1, A makes a loan to Debtor and

obtains a security interest in the same collateral. A has priority even though B's loan was made earlier and was perfected when made. It makes no difference whether A knew of B's security interest when A made its advance.

The problem stated in Example 1 is peculiar to a notice-filing system under which filing may occur before the security interest attaches (see Section 9-502). The justification for determining priority by order of filing lies in the necessity of protecting the filing system—that is, of allowing the first secured party who has filed to make subsequent advances without each time having to check for subsequent filings as a condition of protection. Note, however, that this first-to-file protection is not absolute. For example, Section 9-324 affords priority to certain purchase-money security interests, even if a competing secured party was the first to file or perfect.

Under a notice-filing system, a filed financing statement indicates to third parties that a person may have a security interest in the collateral indicated. With further inquiry, they may discover the complete state of affairs. When a financing statement that is ineffective when filed becomes effective thereafter, the policy underlying the notice-filing system determines the "time of filing" for purposes of subsection (a)(1). For example, the unauthorized filing of an otherwise sufficient initial financing statement becomes authorized, and the financing statement becomes effective, upon the debtor's post-filing authorization or ratification of the filing. See Section 9-509, Comment 3. Because the notice value of the financing statement is independent of the timing of authorization or ratification, the time of the unauthorized filing is the "time of filing" for purposes of subsection (a)(1). The same policy applies to the other priority rules in this part.

Example 2: A and B make non-purchase-money advances secured by the same collateral. The collateral is in Debtor's possession, and neither security interest is perfected when the second advance is made. Whichever secured party first perfects its security interest (by taking possession of the collateral or by filing) takes priority. It makes no difference whether that secured party knows of the other security interest at the time it perfects its own.

The rule of subsection (a)(1), affording priority to the first to file or perfect, applies to security interests that are perfected by any method, including temporarily (Section 9-312) or upon attachment (Section 9-309), even though there may be no notice to creditors or subsequent purchasers and notwithstanding any common-law rule to the contrary. The form of the claim to priority, i.e., filing or perfection, may shift from time to time, and the rank will be based on the first

filing or perfection as long as there is no intervening period without filing or perfection. See Section 9-308(c).

Example 3: On October 1, A acquires a temporarily perfected (20-day) security interest, unfiled, in a negotiable document in the debtor's possession under Section 9-312(e). On October 5, B files and thereby perfects a security interest that previously had attached to the same document. On October 10, A files. A has priority, even after the 20-day period expires, regardless of whether A knows of B's security interest when A files. A was the first to perfect and maintained continuous perfection or filing since the start of the 20-day period. However, the perfection of A's security interest extends only "to the extent it arises for new value given." To the extent A's security interest secures advances made by A beyond the 20-day period, its security interest would be subordinate to B's, inasmuch as B was the first to file.

In general, the rule in subsection (a)(1) does not distinguish among various advances made by a secured party. The priority of every advance dates from the earlier of filing or perfection. However, in rare instances, the priority of an advance dates from the time the advance is made. See Example 3 and Section 9-323.

5. Priority in After-Acquired Property. The application of the priority rules to after-acquired property must be considered separately for each item of collateral. Priority does not depend only on time of perfection but may also be based on priority in filing before perfection.

Example 4: On February 1, A makes advances to Debtor under a security agreement covering "all Debtor's machinery, both existing and after-acquired." A promptly files a financing statement. On April 1, B takes a security interest in all Debtor's machinery, existing and after-acquired, to secure an outstanding loan. The following day, B files a financing statement. On May 1, Debtor acquires a new machine. When Debtor acquires rights in the new machine, both A and B acquire security interests in the machine simultaneously. Both security interests are perfected simultaneously. However, A has priority because A filed before B.

When after-acquired collateral is encumbered by more than one security interest, one of the security interests often is a purchase-money security interest that is entitled to special priority under Section 9-324.

6. Priority in Proceeds: General Rule. Subsection (b)(1) follows former Section 9-312(6). It provides that the baseline rules of subsection (a) apply generally to priority conflicts in proceeds except where otherwise provided (e.g., as in subsections (c) through (e)). Under Section 9-203, attachment cannot oc-

cur (and therefore, under Section 9-308, perfection cannot occur) as to particular collateral until the collateral itself comes into existence and the debtor has rights in it. Thus, a security interest in proceeds of original collateral does not attach and is not perfected until the proceeds come into existence and the debtor acquires rights in them.

Example 5: On April 1, Debtor authenticates a security agreement granting to A a security interest in all Debtor's existing and after-acquired inventory. The same day, A files a financing statement covering inventory. On May 1, Debtor authenticates a security agreement granting B a security interest in all Debtor's existing and future accounts. On June 1, Debtor sells inventory to a customer on 30-day unsecured credit. When Debtor acquires the account, B's security interest attaches to it and is perfected by B's financing statement. At the very same time, A's security interest attaches to the account as proceeds of the inventory and is automatically perfected. See Section 9-315. Under subsection (b) of this section, for purposes of determining A's priority in the account, the time of filing as to the original collateral (April 1, as to inventory) is also the time of filing as to proceeds (account). Accordingly, A's security interest in the account has priority over B's. Of course, had B filed its financing statement before A filed (e.g., on March 1), then B would have priority in the accounts.

Section 9-324 governs the extent to which a special purchase-money priority in goods or software carries over into the proceeds of the original collateral.

7. Priority in Proceeds: Special Rules. Subsections (c), (d), and (e), which are new, provide additional priority rules for proceeds of collateral in situations where the temporal (first-in-time) rules of subsection (a)(1) are not appropriate. These new provisions distinguish what these Comments refer to as "non-filing collateral" from what they call "filing collateral." As used in these Comments, non-filing collateral is collateral of a type for which perfection may be achieved by a method other than filing (possession or control, mainly) and for which secured parties who so perfect generally do not expect or need to conduct a filing search. More specifically, non-filing collateral is chattel paper, deposit accounts, negotiable documents, instruments, investment property, and letter-of-credit rights. Other collateral—accounts, commercial tort claims, general intangibles, goods, non-negotiable documents, and payment intangibles — is filing collateral.

8. Proceeds of Non-Filing Collateral: Non-Temporal Priority. Subsection (c)(2) provides a baseline priority rule for proceeds of non-filing collateral which applies if the secured party has taken the steps required for

non-temporal priority over a conflicting security interest in non-filing collateral (e.g., control, in the case of deposit accounts, letter-of-credit rights, and investment property). This rule determines priority in proceeds of non-filing collateral whether or not there exists an actual conflicting security interest in the original non-filing collateral. Under subsection (c)(2), the priority in the original collateral continues in proceeds if the security interest in proceeds is perfected and the proceeds are cash proceeds or non-filing proceeds “of the same type” as the original collateral. As used in subsection (c)(2), “type” means a type of collateral defined in the Uniform Commercial Code and should be read broadly. For example, a security is “of the same type” as a security entitlement (i.e., investment property), and a promissory note is “of the same type” as a draft (i.e., an instrument).

Example 6: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security. Debtor receives cash proceeds of the security (e.g., dividends deposited into Debtor’s deposit account). If the first-to-file-or-perfect rule of subsection (a)(1) were applied, SP-1’s security interest in the cash proceeds would be senior, although SP-2’s security interest continues perfected under Section 9-315 beyond the 20-day period of automatic perfection. This was the result under former Article 9. Under subsection (c), however, SP-2’s security interest is senior.

Note that a different result would obtain in Example 6 (i.e., SP-1’s security interest would be senior) if SP-1 were to obtain control of the deposit-account proceeds. This is so because subsection (c) is subject to subsection (f), which in turn provides that the priority rules under subsections (a) through (e) are subject to “the other provisions of this part.” One of those “other provisions” is Section 9-327, which affords priority to a security interest perfected by control. See Section 9-327(1).

Example 7: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security. Debtor receives proceeds of the security consisting of a new certificated security issued as a stock dividend on the original collateral. Although the new security is of the same type as the original collateral (i.e., investment property), once the 20-day period of automatic perfection expires (see Section 9-315(d)), SP-2’s security interest is unperfected. (SP-2 has not filed or taken delivery or control, and no temporary-perfection rule applies.) Consequently, once the 20-day period expires, subsection (c) does not confer priority, and, under subsection (a)(2), SP-1’s security interest in the security is senior. This was the result under former Article 9.

Example 8: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security and also by filing against investment property. Debtor receives proceeds of the security consisting of a new certificated security issued as a stock dividend of the collateral. Because the new security is of the same type as the original collateral (i.e., investment property) and (unlike Example 7) SP-2’s security interest is perfected by filing, SP-2’s security interest is senior under subsection (c). If the new security were redeemed by the issuer upon surrender and yet another security were received by Debtor, SP-2’s security interest would continue to enjoy priority under subsection (c). The new security would be proceeds of proceeds.

Example 9: SP-1 perfects its security interest in investment property by filing. SP-2 subsequently perfects its security interest in investment property by taking control of a certificated security and also by filing against investment property. Debtor receives proceeds of the security consisting of a dividend check that it deposits to a deposit account. Because the check and the deposit account are cash proceeds, SP-1’s and SP-2’s security interests in the cash proceeds are perfected under Section 9-315 beyond the 20-day period of automatic perfection. However, SP-2’s security interest is senior under subsection (c).

Example 10: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security and also by filing against investment property. Debtor receives an instrument as proceeds of the security. (Assume that the instrument is not cash proceeds.) Because the instrument is not of the same type as the original collateral (i.e., investment property), SP-2’s security interest, although perfected by filing, does not achieve priority under subsection (c). Under the first-to-file-or-perfect rule of subsection (a)(1), SP-1’s security interest in the proceeds is senior.

The proceeds of proceeds are themselves proceeds. See Section 9-102 (defining “proceeds” and “collateral”). Sometimes competing security interests arise in proceeds that are several generations removed from the original collateral. As the following example explains, the applicability of subsection (c) may turn on the nature of the intervening proceeds.

Example 11: SP-1 perfects its security interest in Debtor’s deposit account by obtaining control. Thereafter, SP-2 files against inventory, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor’s existing and after-acquired inventory. Debtor uses funds from the deposit account to purchase inven-

tory, which SP-1 can trace as identifiable proceeds of its security interest in Debtor's deposit account, and which SP-2 claims as original collateral. The inventory is sold and the proceeds deposited into *another* deposit account, as to which SP-1 has not obtained control. Subsection (c) does not govern priority in this other deposit account. This deposit account is cash proceeds and is also the same type of collateral as SP-1's original collateral, as required by subsections (c)(2)(A) and (B). However, SP-1's security interest does not satisfy subsection (c)(2)(C) because the inventory proceeds, which intervened between the original deposit account and the deposit account constituting the proceeds at issue, are not cash proceeds, proceeds of the same type as the collateral (original deposit account), or an account relating to the collateral. Stated otherwise, once proceeds other than cash proceeds, proceeds of the same type as the original collateral, or an account relating to the original collateral intervene in the chain of proceeds, priority under subsection (c) is thereafter unavailable. The special priority rule in subsection (d) also is inapplicable to this case. See Comment 9, Example 13, below. Instead, the general first-to-file-or-perfect rule of subsections (a) and (b) apply. Under that rule, SP-1 has priority unless its security interest in the inventory proceeds became unperfected under Section 9-315(d). Had SP-2 filed against inventory before SP-1 obtained control of the original deposit account, then SP-2 would have had priority even if SP-1's security interest in the inventory proceeds remained perfected.

If two security interests in the same original collateral are entitled to priority in an item of proceeds under subsection (c)(2), the security interest having priority in the original collateral has priority in the proceeds.

9. Proceeds of Non-Filing Collateral: Special Temporal Priority. Under subsections (d) and (e), if a security interest in non-filing collateral is perfected by a method other than filing (e.g., control or possession), it does not retain its priority over a conflicting security interest in proceeds that are filing collateral. Moreover, it is not entitled to priority in proceeds under the first-to-file-or-perfect rule of subsections (a)(1) and (b). Instead, under subsection (d), priority is determined by a new first-to-file rule.

Example 12: SP-1 perfects its security interest in Debtor's deposit account by obtaining control. Thereafter, SP-2 files against equipment, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor's equipment. SP-1 then files against Debtor's equipment. Debtor uses funds from the deposit account to purchase equipment, which SP-1 can trace as proceeds of its security interest in Debtor's

deposit account. If the first-to-file-or-perfect rule were applied, SP-1's security interest would be senior under subsections (a)(1) and (b), because it was the first to perfect in the original collateral and there was no period during which its security interest was unperfected. Under subsection (d), however, SP-2's security interest would be senior because it filed first. This corresponds with the likely expectations of the parties.

Note that under subsection (e), the first-to-file rule of subsection (d) applies only if the proceeds in question are other than non-filing collateral (i.e., if the proceeds are filing collateral). If the proceeds are non-filing collateral, either the first-to-file-or-perfect rule under subsections (a) and (b) or the non-temporal priority rule in subsection (c) would apply, depending on the facts.

Example 13: SP-1 perfects its security interest in Debtor's deposit account by obtaining control. Thereafter, SP-2 files against inventory, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor's existing and after-acquired inventory. Debtor uses funds from the deposit account to purchase inventory, which SP-1 can trace as identifiable proceeds of its security interest in Debtor's deposit account, and which SP-2 claims as original collateral. The inventory is sold and the proceeds deposited into *another* deposit account, as to which SP-1 has not obtained control. As discussed above in Comment 8, Example 11, subsection (c) does not govern priority in this deposit account. Subsection (d) also does not govern, because the proceeds at issue (the deposit account) are cash proceeds. See subsection (e). Rather, the general rules of subsections (a) and (b) govern.

10. Priority in Supporting Obligations. Under subsections (b)(2) and (c)(1), a security interest having priority in collateral also has priority in a supporting obligation for that collateral. However, the rules in these subsections are subject to the special rule in Section 9-329 governing the priority of security interests in a letter-of-credit right. See subsection (f). Under Section 9-329, a secured party's failure to obtain control (Section 9-107) of a letter-of-credit right that serves as supporting collateral leaves its security interest exposed to a priming interest of a party who does take control.

11. Unperfected Security Interests. Under subsection (a)(3), if conflicting security interests are unperfected, the first to attach has priority. This rule may be of merely theoretical interest, inasmuch as it is hard to imagine a situation where the case would come into litigation without either secured party's having perfected its security interest. If neither security interest had been perfected at the time of the filing of a petition in

bankruptcy, ordinarily neither would be good against the trustee in bankruptcy under the Bankruptcy Code.

12. Agricultural Liens. Statutes other than this Article may purport to grant priority to an agricultural lien as against a conflicting security interest or agricultural lien. Under subsection (g), if another statute grants priority to an agricultural lien, the agricultural lien has priority only if the same statute creates the agricultural lien and the agricultural lien is perfected. Otherwise, subsection (a) applies the same priority rules to an agricultural lien as to a security interest,

regardless of whether the agricultural lien conflicts with another agricultural lien or with a security interest.

Inasmuch as no agricultural lien on proceeds arises under this Article, subsections (b) through (e) do not apply to proceeds of agricultural liens. However, if an agricultural lien has priority under subsection (g) and the statute creating the agricultural lien gives the secured party a lien on proceeds of the collateral subject to the lien, a court should apply the principle of subsection (g) and award priority in the proceeds to the holder of the perfected agricultural lien.

28-9-322A. Security interests in crops for provision of agricultural chemicals. — (a) As used in this section:

(1) “Agricultural chemical” means fertilizers and other chemicals applied to crops or land which is to be used for the raising of crops, including pesticides, soil amendments and plant regulators.

(2) “Fall agricultural chemical security interest” means a security interest in specific crops growing or to be grown granted by a grower to a supplier to secure the grower’s obligation to repay value given by the supplier to enable the grower to purchase from the supplier (A) agricultural chemicals to apply to such crops or to land on which such crops will be grown, and (B) application of such agricultural chemicals if such application is performed by the supplier. To qualify as a fall agricultural chemical security interest, the security interest must also satisfy the following conditions:

(i) Before supplying the agricultural chemicals to the grower, the supplier and grower provide the lender with a notification statement and opportunity to respond in accordance with this section;

(ii) The security interest is perfected within twenty (20) days after the agricultural chemicals are delivered to the grower; and

(iii) The agricultural chemicals are actually applied to the grower’s land or crops during the period September 1 through December 15.

(3) “Grower” shall mean a specified debtor of a lender.

(4) “Lender” shall mean the holder of an existing perfected security interest in crops of a grower.

(5) “Letter of response” shall mean a statement by a lender containing the information specified in subsection (j) of this section.

(6) “Notification statement” shall mean a statement by a supplier containing the information specified in subsection (h) of this section.

(7) “Supplier” shall mean a person who supplies agricultural chemicals to a grower.

(b) A supplier may obtain a fall agricultural chemical security interest as provided in this section. To the extent not otherwise expressly provided in this section, the provisions of this chapter apply to a fall agricultural chemical security interest. The amount secured by a fall agricultural security interest shall be the lesser of: (i) the agreed charges for the agricultural chemicals and application costs provided pursuant to the

notification statement; or (ii) the amount of the anticipated charges as reflected in the notification statement.

(c) A fall agricultural chemical security interest attaches to the existing crops upon the land where the agricultural chemical is applied, or if crops are not planted at the time of the application, to the next production crop from that land. It does not attach to crops already harvested or which are harvested before December 15 from such land, or to crops to be grown on such land after the next production crop, or to crops grown on other land than that identified in the notification statement.

(d) A fall agricultural chemical security interest is perfected by filing a financing statement.

(e) A fall agricultural chemical security interest shall have priority over a conflicting security interest in the same crops and identifiable proceeds thereof except for a prior perfected fall agricultural chemical security interest. In the event of any commingling of crops or proceeds covered by a fall agricultural chemical security interest with other crops or proceeds, the burden of proving the applicability of the fall agricultural chemical security interest to any particular crops or proceeds is on the supplier asserting it.

(f) Nothing in this section is intended to limit the priority of agricultural liens established by the statutes creating such liens, and a perfected agricultural lien shall have priority over a conflicting security interest (including a fall agricultural chemical security interest) if the statute creating the agricultural lien provides such priority.

(g) A supplier may notify the lender that the supplier intends to supply agricultural chemicals to the grower and that the supplier requests the lender to issue a letter of response. In order to so notify the lender, the supplier shall provide a notification statement to the lender in an envelope marked CROP SECURITY INTEREST NOTIFICATION STATEMENT, sent by certified mail addressed to the lender at the address for such lender shown on such lender's most recently filed UCC-1F financing statement regarding that grower.

(h) A notification statement shall contain:

- (1) The name, address and signature of the supplier providing the notification statement;
- (2) The date the notification statement was prepared;
- (3) The name and address of the lender;
- (4) The name and address of the person to whom the lender's response to the supplier should be addressed;
- (5) A description and anticipated date of the application of agricultural chemicals and the anticipated charges for the agricultural chemicals, including anticipated application costs;
- (6) The name, address and signature of the grower to whom the supplier furnished or intends to furnish agricultural chemicals;
- (7) A reasonable description of the real estate sufficient to identify the same where the agricultural chemicals are to be applied;
- (8) The name and address of the owner (if other than the grower) of such real property;
- (9) A description of the crops growing or to be grown on such real property

as to which the supplier intends to supply agricultural chemicals and upon which the supplier claims or intends to obtain a security interest; (10) The social security number or federal tax identification number of the grower to whom the supplier intends to provide agricultural chemicals; and

(11) The social security number or federal tax identification number of the supplier providing the notice.

(i) Within fifteen (15) days after actual receipt of a notification statement, the lender shall deposit in the U.S. mail, certified, a letter of response to the supplier. A copy of the lender's letter of response shall be sent to the grower.

(j) A letter of response shall contain the name, address and signature of the lender, and either

(1) A statement by the lender that there is an outstanding commitment for operating financing from the lender to the grower, and that the lender shall reserve the amount in the notification statement for the purpose of honoring drafts or other demands for payment by the supplier accompanied by invoices signed by the grower or other proof of delivery signed by the grower; or

(2) A statement by the lender that the lender shall subordinate the priority of its security interest in specified crops of the grower to the priority of the security interest in such crops obtained or to be obtained by the supplier, and specifying that the maximum amount of such subordination shall be the amount stated in the notification statement; or

(3) A statement by the lender that it declines to either reserve funds or subordinate its security interest.

(k) If the lender's letter of response states that the lender declines to either reserve funds or subordinate its security interest, the respective rights of the lender and the supplier are not affected by this section and the relative priority between the lender's security interest in crops, and any security interest obtained by the supplier in such crops, shall be determined according to the ordinary rules governing the priority of conflicting security interests in the same collateral, unless the supplier's security interest is a fall agricultural chemical security interest.

(l) If the lender does not mail its letter of response to the supplier within fifteen (15) days after receiving the notification statement, and the supplier has perfected a security interest in such crops or perfects such security interest within ten (10) days after the expiration of the fifteen (15) day period for the lender to respond, the supplier's perfected security interest in such crops shall take priority over the lender's perfected security interest in such crops, but only to the extent of the lesser of (1) the amount stated in the notification statement, or (2) the unpaid agreed charges for the agricultural chemicals identified in the notification statement and actually applied to, or for the benefit of, such crops.

(m) Any amounts repaid by any person on the grower's obligation for which the supplier has obtained an agricultural chemical security interest shall reduce the value of the agricultural chemical security interest on a dollar-for-dollar basis, and amounts may not be reborrowed or readvanced under the same notification statement. If the supplier receives proceeds of

any collateral of the lender (other than proceeds of the crops covered by the fall agricultural security interest), such proceeds shall be turned over to the lender. In order to obtain the benefits of this section, any additional sales of agricultural chemicals not included in the original notification statement must be the subject of a new notification statement, to which the lender may issue a new letter of response.

(n) No one but the supplier shall be entitled to rely on a letter of response. Rights (if any) under a letter of response are not assignable, except in connection with an assignment by the supplier of the entire security interest to which such letter of response relates. By issuing a letter of response and performing thereunder, the lender does not become a partner, joint venturer or fiduciary of either the grower or the supplier.

(o)(1) The secretary of state shall publish a form substantially as follows:

Name of supplier
Address
SSN/TIN
Date notification statement was prepared

Name of lender
Address

Name of person to whom lender’s response to supplier should be
addressed
Address

Description and anticipated date of the application of agricultural chemicals
.....

Anticipated charges for the agricultural chemicals
Anticipated charges for application, if not included in charges for chemicals
.....

Name of grower
Address
SSN/TIN

Reasonable description of the real estate where the agricultural chemicals
are to be applied
.....

Name of owner of real property (if other than grower)
.....
Address

Crops growing or to be grown on such real property as to which the supplier
intends to supply agricultural chemicals and upon which supplier intends to
obtain a security interest
.....

Signature of supplier
Signature of grower

(2) On the reverse side of the form described in subsection (1) of this

section, the secretary of state shall provide a form for the lender's letter of response, substantially as follows:

Name of lender
Address

Lender responds to notification statement as follows (choose one):

- ☐ An outstanding commitment for operating financing exists for this grower. Of that commitment, lender hereby reserves the amount specified in the notification statement for the purpose of honoring drafts or other demands for payment by supplier, accompanied by invoices signed by grower or other proof of delivery signed by grower.
- ☐ Lender hereby subordinates the priority of its security interest in (specify crops) of grower to the priority of the security interest in such crops obtained or to be obtained by supplier, such subordination to be in the amount specified in the notification statement.
- ☐ Lender declines to either reserve funds or subordinate its security interest.

Signature of lender

(3) Suppliers and lenders are required to use the form published by the secretary of state.

History.

I.C., § 28-9-322A, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

This section is not derived from the uniform code.

The words enclosed in parentheses so appeared in the law as enacted.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

28-9-323. Future advances. — (a) Except as otherwise provided in subsection (c) of this section, for purposes of determining the priority of a perfected security interest under section 28-9-322(a)(1)[, Idaho Code], perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that:

- (1) Is made while the security interest is perfected only:
 - (A) under section 28-9-309[, Idaho Code,] when it attaches; or
 - (B) temporarily under section 28-9-312(e), (f) or (g)[, Idaho Code]; and
- (2) Is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under section 28-9-309 or 28-9-312(e), (f) or (g)[, Idaho Code].

(b) Except as otherwise provided in subsection (c) of this section, a security interest is subordinate to the rights of a person that becomes a lien creditor to the extent that the security interest secures an advance made

more than forty-five (45) days after the person becomes a lien creditor unless the advance is made:

- (1) Without knowledge of the lien; or
- (2) Pursuant to a commitment entered into without knowledge of the lien.

(c) Subsections (a) and (b) of this section do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor.

(d) Except as otherwise provided in subsection (e) of this section, a buyer of goods other than a buyer in ordinary course of business takes free of a security interest to the extent that it secures advances made after the earlier of:

- (1) The time the secured party acquires knowledge of the buyer's purchase; or
- (2) Forty-five (45) days after the purchase.

(e) Subsection (d) of this section does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the forty-five (45) day period.

(f) Except as otherwise provided in subsection (g) of this section, a lessee of goods, other than a lessee in ordinary course of business, takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of:

- (1) The time the secured party acquires knowledge of the lease; or
- (2) Forty-five (45) days after the lease contract becomes enforceable.

(g) Subsection (f) of this section does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the forty-five (45) day period.

History.

I.C., § 28-9-323, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout subsection (a) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-312(7), 9-301(4), 9-307(3), 2A-307(4).

2. **Scope of This Section.** A security agreement may provide that collateral secures future advances. See Section 9-204(c). This section collects all of the special rules dealing with the priority of advances made by a secured party after a third party acquires an interest in the collateral. Subsection (a) applies when the third party is a competing secured party. It replaces and clarifies former Section 9-312(7). Subsection (b) deals with lien creditors and replaces former Section 9-301(4). Subsections (d) and (e) deal with

buyers and replace former Section 9-307(3). Subsections (f) and (g) deal with lessees and replace former Section 2A-307(4).

3. **Competing Security Interests.** Under a proper reading of the first-to-file-or-perfect rule of Section 9-322(a)(1) (and former Section 9-312(5)), it is abundantly clear that the time when an advance is made plays no role in determining priorities among conflicting security interests except when a financing statement was not filed and the advance is the giving of value as the last step for attachment and perfection. Thus, a secured party takes subject to all advances secured by a

competing security interest having priority under Section 9-322(a)(1). This result generally obtains regardless of how the competing security interest is perfected and regardless of whether the advances are made “pursuant to commitment” (Section 9-102). Subsection (a) of this section states the only other instance when the time of an advance figures in the priority scheme in Section 9-322: when the security interest is perfected only automatically under Section 9-309 or temporarily under Section 9-312(e), (f), or (g), and the advance is not made pursuant to a commitment entered into while the security interest was perfected by another method. Thus, an advance has priority from the date it is made only in the rare case in which it is made without commitment and while the security interest is perfected only temporarily under Section 9-312.

The new formulation in subsection (a) clarifies the result when the initial advance is paid and a new (“future”) advance is made subsequently. Under former Section 9-312(7), the priority of the new advance turned on whether it was “made while a security interest is perfected.” This section resolves any ambiguity by omitting the quoted phrase.

Example 1: On February 1, A makes an advance secured by machinery in the debtor’s possession and files a financing statement. On March 1, B makes an advance secured by the same machinery and files a financing statement. On April 1, A makes a further advance, under the original security agreement, against the same machinery. A was the first to file and so, under the first-to-file-or-perfect rule of Section 9-322(a)(1), A’s security interest has priority over B’s, both as to the February 1 and as to the April 1 advance. It makes no difference whether A knows of B’s intervening advance when A makes the second advance. Note that, as long as A was the first to file or perfect, A would have priority with respect to both advances if either A or B had perfected by taking possession of the collateral. Likewise, A would have priority if A’s April 1 advance was not made under the original agreement with the debtor, but was under a new agreement.

Example 2: On October 1, A acquires a temporarily perfected (20-day) security interest, unfiled, in a negotiable document in the debtor’s possession under Section 9-312(e) or (f). The security interest secures an advance made on that day as well as future advances. On October 5, B files and thereby perfects a security interest that previously had attached to the same document. On October 8, A makes an additional advance. On October 10, A files. Under Section 9-322(a)(1), because A was the first to perfect and maintained continuous perfection or filing since the start of the 20-day period, A has priority, even after the

20-day period expires. See Section 9-322, Comment 4, Example 3. However, under this section, for purposes of Section 9-322(a)(1), to the extent A’s security interest secures the October 8 advance, the security interest was perfected on October 8. Inasmuch as B perfected on October 5, B has priority over the October 8 advance.

The rule in subsection (a) is more liberal toward the priority of future advances than the corresponding rules applicable to intervening lien creditors (subsection (b)), buyers (subsections (d) and (e)), and lessees (subsections (f) and (g)).

4. Competing Lien Creditors. Subsection (b) replaces former Section 9-301(4) and addresses the rights of a “lien creditor,” as defined in Section 9-102. Under Section 9-317(a)(2), a security interest is senior to the rights of a person who becomes a lien creditor, unless the person becomes a lien creditor before the security interest is perfected and before a financing statement covering the collateral is filed and Section 9-203(b)(3) is satisfied. Subsection (b) of this section provides that a security interest is subordinate to those rights to the extent that the specified circumstances occur. Subsection (b) does not elevate the priority of a security interest that is subordinate to the rights of a lien creditor under Section 9-317(a)(2); it only subordinates.

As under former Section 9-301(4), a secured party’s knowledge does not cut short the 45-day period during which future advances can achieve priority over an intervening lien creditor’s interest. Rather, because of the impact of the rule in subsection (b) on the question whether the security interest for future advances is “protected” under Section 6323(c)(2) and (d) of the Internal Revenue Code as amended by the Federal Tax Lien Act of 1966, the priority of the security interest for future advances over a lien creditor is made absolute for 45 days regardless of knowledge of the secured party concerning the lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien.

5. Sales of Receivables; Consignments. Subsections (a) and (b) do not apply to outright sales of accounts, chattel paper, payment intangibles, or promissory notes, nor do they apply to consignments.

6. Competing Buyers and Lessees. Under subsections (d) and (e), a buyer will not take subject to a security interest to the extent it secures advances made after the secured party has knowledge that the buyer has purchased the collateral or more than 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45-day

period and without knowledge of the purchase. Subsections (f) and (g) provide an analogous rule for lessees. Of course, a buyer in ordinary course who takes free of the security interest under Section 9-320 and a lessee in ordinary course who takes free under Section

9-321 are not subject to any future advances. Subsections (d) and (e) replace former Section 9-307(3), and subsections (f) and (g) replace former Section 2A-307(4). No change in meaning is intended.

28-9-324. Priority of purchase-money security interests. —

(a) Except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods and, except as otherwise provided in section 28-9-327[, Idaho Code], a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within twenty (20) days thereafter.

(b) Subject to subsection (c) of this section and except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in section 28-9-330[, Idaho Code], and, except as otherwise provided in section 28-9-327[, Idaho Code], also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

- (1) The purchase-money security interest is perfected when the debtor receives possession of the inventory;
- (2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;
- (3) The holder of the conflicting security interest receives the notification within five (5) years before the debtor receives possession of the inventory; and
- (4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

(c) Subsections (b)(2) through (b)(4) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory:

- (1) If the purchase-money security interest is perfected by filing, before the date of the filing; or
- (2) If the purchase-money security interest is temporarily perfected without filing or possession under section 28-9-312(f)[, Idaho Code], before the beginning of the twenty (20) day period thereunder.

(d) Subject to subsection (e) of this section and except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock and, except as otherwise provided in section 28-9-327[, Idaho Code], a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

- (1) The purchase-money security interest is perfected when the debtor receives possession of the livestock;
 - (2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;
 - (3) The holder of the conflicting security interest receives the notification within six (6) months before the debtor receives possession of the livestock; and
 - (4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in livestock of the debtor and describes the livestock.
- (e) Subsections (d)(2) through (d)(4) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock:
- (1) If the purchase-money security interest is perfected by filing, before the date of the filing; or
 - (2) If the purchase-money security interest is temporarily perfected without filing or possession under section 28-9-312(f)[, Idaho Code], before the beginning of the twenty (20) day period thereunder.
- (f) Except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in software has priority over a conflicting security interest in the same collateral and, except as otherwise provided in section 28-9-327[, Idaho Code], a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase-money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this section.
- (g) If more than one (1) security interest qualifies for priority in the same collateral under subsection (a), (b), (d) or (f) of this section:
- (1) A security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and
 - (2) In all other cases, section 28-9-322(a)[, Idaho Code,] applies to the qualifying security interests.

History.

I.C., § 28-9-324, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-312(3), (4).
2. **Priority of Purchase-Money Security Interests.** This section contains the priority rules applicable to purchase-money se-

curity interests, as defined in Section 9-103. It affords a special, non-temporal priority to those purchase-money security interests that satisfy the statutory conditions. In most

cases, priority will be over a security interest asserted under an after-acquired property clause. See Section 9-204 on the extent to which security interests in after-acquired property are validated.

A purchase-money security interest can be created only in goods and software. See Section 9-103. Section 9-324(a), which follows former Section 9-312(4), contains the general rule for purchase-money security interests in goods. It is subject to subsections (b) and (c), which derive from former Section 9-312(3) and apply to purchase-money security interests in inventory, and subsections (d) and (e), which apply to purchase-money security interests in livestock that are farm products. Subsection (f) applies to purchase-money security interests in software. Subsection (g) deals with the relatively unusual case in which a debtor creates two purchase-money security interests in the same collateral and both security interests qualify for special priority under one of the other subsections.

Former Section 9-312(2) contained a rule affording special priority to those who provided secured credit that enabled a debtor to produce crops. This rule proved unworkable and has been eliminated from this Article. Instead, model Section 9-324A contains a revised production-money priority rule. That section is a model, not uniform, provision. The sponsors of the UCC have taken no position as to whether it should be enacted, instead leaving the matter for state legislatures to consider if they are so inclined.

3. Purchase-Money Priority in Goods Other Than Inventory and Livestock.

Subsection (a) states a general rule applicable to all types of goods except inventory and farm-products livestock: the purchase-money interest takes priority if it is perfected when the debtor receives possession of the collateral or within 20 days thereafter. (As to the 20-day "grace period," compare Section 9-317(e). Former Sections 9-312(4) and 9-301(2) contained a 10-day grace period.) The perfection requirement means that the purchase-money secured party either has filed a financing statement before that time or has a temporarily perfected security interest in goods covered by documents under Section 9-312(e) and (f) which is continued in a perfected status by filing before the expiration of the 20-day period specified in that section. A purchase-money security interest qualifies for priority under subsection (a), even if the purchase-money secured party knows that a conflicting security interest has been created and/or that the holder of the conflicting interest has filed a financing statement covering the collateral.

Normally, there will be no question when "the debtor receives possession of the collateral" for purposes of subsection (a). However, sometimes a debtor buys goods and takes

possession of them in stages, and then assembly and testing are completed (by the seller or debtor-buyer) at the debtor's location. Under those circumstances, the buyer "takes possession" within the meaning of subsection (a) when, after an inspection of the portion of the goods in the debtor's possession, it would be apparent to a potential lender to the debtor that the debtor has acquired an interest in the goods taken as a whole.

A similar issue concerning the time when "the debtor receives possession" arises when a person acquires possession of goods under a transaction that is not governed by this Article and then later agrees to buy the goods on secured credit. For example, a person may take possession of goods as lessee under a lease contract and then exercise an option to purchase the goods from the lessor on secured credit. Under Section 2A-307(1), creditors of the lessee generally take subject to the lease contract; filing a financing statement against the lessee is unnecessary to protect the lessor's leasehold or residual interest. Once the lease is converted to a security interest, filing a financing statement is necessary to protect the seller's (former lessor's) security interest. Accordingly, the 20-day period in subsection (a) does not commence until the goods become "collateral" (defined in Section 9-102), i.e., until they are subject to a security interest.

4. Purchase-Money Security Interests in Inventory.

Subsections (b) and (c) afford a means by which a purchase-money security interest in inventory can achieve priority over an earlier-filed security interest in the same collateral. To achieve priority, the purchase-money security interest must be perfected when the debtor receives possession of the inventory. For a discussion of when "the debtor receives possession," see Comment 3, above. The 20-day grace period of subsection (a) does not apply.

The arrangement between an inventory secured party and its debtor typically requires the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though it has already given a purchase-money security interest in the inventory to another secured party. For this reason, subsections (b)(2) through (4) and (c) impose a second condition for the purchase-money security interest's achieving priority: the purchase-money secured party must give notification to the holder of a conflicting security interest who filed against the same item or type of inventory before the purchase-money secured party filed or its security interest became perfected temporarily under Section 9-312(e) or (f). The notification requirement protects the non-purchase-money inventory secured party in

such a situation: if the inventory secured party has received notification, it presumably will not make an advance; if it has not received notification (or if the other security interest does not qualify as purchase-money), any advance the inventory secured party may make ordinarily will have priority under Section 9-322. Inasmuch as an arrangement for periodic advances against incoming goods is unusual outside the inventory field, subsection (a) does not contain a notification requirement.

5. Notification to Conflicting Inventory Secured Party: Timing. Under subsection (b)(3), the perfected purchase-money security interest achieves priority over a conflicting security interest only if the holder of the conflicting security interest receives a notification within five years before the debtor receives possession of the purchase-money collateral. If the debtor never receives possession, the five-year period never begins, and the purchase-money security interest has priority, even if notification is not given. However, where the purchase-money inventory financing began by the purchase-money secured party's possession of a negotiable document of title, to retain priority the secured party must give the notification required by subsection (b) at or before the usual time, i.e., when the debtor gets possession of the inventory, even though the security interest remains perfected for 20 days under Section 9-312(e) or (f).

Some people have mistakenly read former Section 9-312(3)(b) to require, as a condition of purchase-money priority in inventory, that the purchase-money secured party give the notification before it files a financing statement. Read correctly, the "before" clauses compare (i) the time when the holder of the conflicting security interest filed a financing statement with (ii) the time when the purchase-money security interest becomes perfected by filing or automatically perfected temporarily. Only if (i) occurs before (ii) must notification be given to the holder of the conflicting security interest. Subsection (c) has been rewritten to clarify this point.

6. Notification to Conflicting Inventory Secured Party: Address. Inasmuch as the address provided as that of the secured party on a filed financing statement is an "address that is reasonable under the circumstances," the holder of a purchase-money security interest may satisfy the requirement to "send" notification to the holder of a conflicting security interest in inventory by sending a notification to that address, even if the address is or becomes incorrect. See Section 9-102 (definition of "send"). Similarly, because the address is "held out by [the holder of the conflicting security interest] as the place for receipt of such communications [i.e., commu-

nications relating to security interests]," the holder is deemed to have "received" a notification delivered to that address. See Section 1-202(e).

7. Consignments. Subsections (b) and (c) also determine the priority of a consignor's interest in consigned goods as against a security interest in the goods created by the consignee. Inasmuch as a consignment subject to this Article is defined to be a purchase-money security interest, see Section 9-103(d), no inference concerning the nature of the transaction should be drawn from the fact that a consignor uses the term "security interest" in its notice under subsection (b)(4). Similarly, a notice stating that the consignor has delivered or expects to deliver goods, properly described, "on consignment" meets the requirements of subsection (b)(4), even if it does not contain the term "security interest," and even if the transaction subsequently is determined to be a security interest. Cf. Section 9-505 (use of "consignor" and "consignee" in financing statement).

8. Priority in Proceeds: General. When the purchase-money secured party has priority over another secured party, the question arises whether this priority extends to the proceeds of the original collateral. Subsections (a), (d), and (f) give an affirmative answer, but only as to proceeds in which the security interest is perfected (see Section 9-315). Although this qualification did not appear in former Section 9-312(4), it was implicit in that provision.

In the case of inventory collateral under subsection (b), where financing frequently is based on the resulting accounts, chattel paper, or other proceeds, the special priority of the purchase-money secured interest carries over into only certain types of proceeds. As under former Section 9-312(3), the purchase-money priority in inventory under subsection (b) carries over into identifiable cash proceeds (defined in Section 9-102) received on or before the delivery of the inventory to a buyer.

As a general matter, also like former Section 9-312(3), the purchase-money priority in inventory does *not* carry over into proceeds consisting of accounts or chattel paper. Many parties financing inventory are quite content to protect their first-priority security interest in the inventory itself. They realize that when the inventory is sold, someone else will be financing the resulting receivables (accounts or chattel paper), and the priority for inventory will not run forward to the receivables constituting the proceeds. Indeed, the cash supplied by the receivables financier often will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase-money basis makes contractual arrangements that the proceeds

of receivables financing by another be devoted to paying off the inventory security interest.

However, the purchase-money priority in inventory *does* carry over to proceeds consisting of chattel paper and its proceeds (and also to instruments) to the extent provided in Section 9-330. Under Section 9-330(e), the holder of a purchase-money security interest in inventory is deemed to give new value for proceeds consisting of chattel paper. Taken together, Sections 9-324(b) and 9-330(e) enable a purchase-money inventory secured party to obtain priority in chattel paper constituting proceeds of the inventory, even if the secured party does not actually give new value for the chattel paper, provided the purchase-money secured party satisfies the other conditions for achieving priority.

When the proceeds of original collateral (goods or software) consist of a deposit account, Section 9-327 governs priority to the extent it conflicts with the priority rules of this section.

9. Priority in Accounts Constituting Proceeds of Inventory. The application of the priority rules in subsection (b) is shown by the following examples:

Example 1: Debtor creates a security interest in its existing and after-acquired inventory in favor of SP-1, who files a financing statement covering inventory. SP-2 subsequently takes a purchase-money security interest in certain inventory and, under subsection (b), achieves priority in this inventory over SP-1. This inventory is then sold, producing accounts. Accounts are not cash proceeds, and so the special purchase-money priority in the inventory does not control the priority in the accounts. Rather, the first-to-file-or-perfect rule of Section 9-322(a)(1) applies. The time of SP-1's filing as to the inventory is also the time of filing as to the accounts under Section 9-322 (b). Assuming that each security interest in the accounts proceeds remains perfected under Section 9-315, SP-1 has priority as to the accounts.

Example 2: In Example 1, if SP-2 had filed directly against accounts, the date of that filing as to accounts would be compared with the date of SP-1's filing as to the inventory. The first filed would prevail under Section 9-322(a)(1).

Example 3: If SP-3 had filed against accounts in Example 1 before either SP-1 or SP-2 filed against inventory, SP-3's filing against accounts would have priority over the filings of SP-1 and SP-2. This result obtains even though the filings against inventory are effective to continue the perfected status of SP-1's and SP-2's security interest in the accounts beyond the 20-day period of automatic perfection. See Section 9-315. SP-1's and SP-2's position as to the inventory does not give them a claim to accounts (as proceeds

of the inventory) which is senior to someone who has filed earlier against accounts. If, on the other hand, either SP-1's or SP-2's filing against the inventory preceded SP-3's filing against accounts, SP-1 or SP-2 would outrank SP-3 as to the accounts.

10. Purchase-Money Security Interests in Livestock. New subsections (d) and (e) provide a purchase-money priority rule for farm-products livestock. They are patterned on the purchase-money priority rule for inventory found in subsections (b) and (c) and include a requirement that the purchase-money secured party notify earlier-filed parties. Two differences between subsections (b) and (d) are noteworthy. First, unlike the purchase-money inventory lender, the purchase-money livestock lender enjoys priority in *all* proceeds of the collateral. Thus, under subsection (d), the purchase-money secured party takes priority in accounts over an earlier-filed accounts financier. Second, subsection (d) affords priority in certain products of the collateral as well as proceeds.

11. Purchase-Money Security Interests in Aquatic Farm Products. Aquatic goods produced in aquacultural operations (e.g., catfish raised on a catfish farm) are farm products. See Section 9-102 (definition of "farm products"). The definition does not indicate whether aquatic goods are "crops," as to which the model production money security interest priority in Section 9-324A applies, or "livestock," as to which the purchase-money priority in subsection (d) of this section applies. This Article leaves courts free to determine the classification of particular aquatic goods on a case-by-case basis, applying whichever priority rule makes more sense in the overall context of the debtor's business.

12. Purchase-Money Security Interests in Software. Subsection (f) governs the priority of purchase-money security interests in software. Under Section 9-103(c), a purchase-money security interest arises in software only if the debtor acquires its interest in the software for the principal purpose of using the software in goods subject to a purchase-money security interest. Under subsection (f), a purchase-money security interest in software has the same priority as the purchase-money security interest in the goods in which the software was acquired for use. This priority is determined under subsections (b) and (c) (for inventory) or (a) (for other goods).

13. Multiple Purchase-Money Security Interests. New subsection (g) governs priority among multiple purchase-money security interests in the same collateral. It grants priority to purchase-money security interests securing the price of collateral (i.e., created in favor of the seller) over purchase-money security interests that secure enabling loans. Section 7.2(c) of the Restatement (3d) of the Law

of Property (Mortgages) (1997) adopts this rule with respect to real property mortgages. As Comment d to that section explains:

The equities favor the vendor. Not only does the vendor part with specific real estate rather than money, but the vendor would never relinquish it at all except on the understanding that the vendor will be able to use it to satisfy the obligation to pay the price. This is the case even though the vendor may know that the mortgagor is going to finance the

transaction in part by borrowing from a third party and giving a mortgage to secure that obligation. In the final analysis, the law is more sympathetic to the vendor's hazard of losing real estate previously owned than to the third party lender's risk of being unable to collect from an interest in real estate that never previously belonged to it.

The first-to-file-or-perfect rule of Section 9-322 applies to multiple purchase-money security interests securing enabling loans.

28-9-325. Priority of security interests in transferred collateral.

— (a) Except as otherwise provided in subsection (b) of this section, a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if:

- (1) The debtor acquired the collateral subject to the security interest created by the other person;
- (2) The security interest created by the other person was perfected when the debtor acquired the collateral; and
- (3) There is no period thereafter when the security interest is unperfected.

(b) Subsection (a) of this section subordinates a security interest only if the security interest:

- (1) Otherwise would have priority solely under section 28-9-322(a) or 28-9-324[, Idaho Code]; or
- (2) Arose solely under section 28-2-711(3) or 28-12-508(5)[, Idaho Code].

History.

I.C., § 28-9-325, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in paragraphs (b)(1) and (b)(2) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. "Double Debtor Problem." This section addresses the "double debtor" problem, which arises when a debtor acquires property that is subject to a security interest created by another debtor.

3. Taking Subject to Perfected Security Interest. Consider the following scenario:

Example 1: A owns an item of equipment subject to a perfected security interest in favor of SP-A. A sells the equipment to B, not in the ordinary course of business. B acquires its interest subject to SP-A's security interest. See Sections 9-201, 9-315(a)(1). Under this section, if B creates a security interest in the

equipment in favor of SP-B, SP-B's security interest is subordinate to SP-A's security interest, even if SP-B filed against B before SP-A filed against A, and even if SP-B took a purchase-money security interest. Normally, SP-B could have investigated the source of the equipment and discovered SP-A's filing before making an advance against the equipment, whereas SP-A had no reason to search the filings against someone other than its debtor, A.

4. Taking Subject to Unperfected Security Interest. This section applies only if the security interest in the transferred collateral was perfected when the transferee acquired the collateral. See subsection (a)(2). If

this condition is not met, then the normal priority rules apply.

Example 2: A owns an item of equipment subject to an unperfected security interest in favor of SP-A. A sells the equipment to B, who gives value and takes delivery of the equipment without knowledge of the security interest. B takes free of the security interest. See Section 9-317(b). If B then creates a security interest in favor of SP-B, no priority issue arises; SP-B has the only security interest in the equipment.

Example 3: The facts are as in Example 2, except that B knows of SP-A's security interest and therefore takes the equipment subject to it. If B creates a security interest in the equipment in favor of SP-B, this section does not determine the relative priority of the security interests. Rather, the normal priority rules govern. If SP-B perfects its security interest, then, under Section 9-322(a)(2), SP-A's unperfected security interest will be junior to SP-B's perfected security interest. The award of priority to SP-B is premised on the belief that SP-A's failure to file could have misled SP-B.

5. Taking Subject to Perfected Security Interest that Becomes Unperfected. This section applies only if the security interest in the transferred collateral did not become unperfected at any time after the transferee acquired the collateral. See subsection (a)(3). If this condition is not met, then the normal priority rules apply.

Example 4: As in Example 1, A owns an item of equipment subject to a perfected secu-

rity interest in favor of SP-A. A sells the equipment to B, not in the ordinary course of business. B acquires its interest subject to SP-A's security interest. See Sections 9-201, 9-315(a)(1). B creates a security interest in favor of SP-B, and SP-B perfects its security interest. This section provides that SP-A's security interest is senior to SP-B's. However, if SP-A's financing statement lapses while SP-B's security interest is perfected, then the normal priority rules would apply, and SP-B's security interest would become senior to SP-A's security interest. See Sections 9-322(a)(2), 9-515(c).

6. Unusual Situations. The appropriateness of the rule of subsection (a) is most apparent when it works to subordinate security interests having priority under the basic priority rules of Section 9-322(a) or the purchase-money priority rules of Section 9-324. The rule also works properly when applied to the security interest of a buyer under Section 2-711(3) or a lessee under Section 2A-508(5). However, subsection (a) may provide an inappropriate resolution of the "double debtor" problem in some of the wide variety of other contexts in which the problem may arise. Although subsection (b) limits the application of subsection (a) to those cases in which subordination is known to be appropriate, courts should apply the rule in other settings, if necessary to promote the underlying purposes and policies of the Uniform Commercial Code. See Section 1-103(a).

28-9-326. Priority of security interests created by new debtor. —

(a) Subject to subsection (b) of this section, a security interest that is created by a new debtor in collateral in which the new debtor has or acquires rights and [is] perfected by a filed financing statement that would be ineffective to perfect the security interest but for the application of sections 28-9-316(i)(1) and 28-9-508, Idaho Code, is subordinate to a security interest in the same collateral which is perfected other than by such a filed financing statement.

(b) The other provisions of this part determine the priority among conflicting security interests in the same collateral perfected by filed financing statements described in subsection (a) of this section. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound.

History.

I.C., § 28-9-326, as added by 2001, ch. 208, § 2, p. 704; am. 2012, ch. 145, § 7, p. 381.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 145, substituted “in collateral in which the new debtor has or acquires rights and perfected by a filed financing statement that would be ineffective to perfect the security interest but for the application of sections 28-9-316(i)(1) and 28-9-508, Idaho Code, is subordinate to a security interest in the same collateral which is perfected other than by such a filed financing statement” for “which is perfected by a filed financing statement that is effective solely under section 28-9-508 in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely

under section 28-9-508” in subsection (a) and substituted “described in subsection (a) of this section” for “that are effective solely under section 28-9-508” in subsection (b).

Compiler's Notes.

The bracketed insertion in subsection (a) was added by the compiler to add a word seemingly missing from the 2012 amendment of this section.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS

Application.

Pursuant to former § 28-9-312(5)(a), the priority of the bank's security interest granted under the March 5, 1999 security agreement related back to February 3, 1999, which was when it had filed a financing statement to perfect its security interest in the debtor's collateral, which included its equipment; thus, the bank had priority over

the security interest of the investor, which was perfected on March 1, 1999. If the investor wanted a security interest in the equipment that had priority over the bank's security interest, then the investor needed to contact the bank to reach such an agreement. *Bank of the West v. Life Investors Ins. Co. of Am.*, 139 Idaho 445, 80 P.3d 1046 (2003).

OFFICIAL COMMENT

1. Source. New.

2. Subordination of Security Interests Created by New Debtor. This section addresses the priority contests that may arise when a new debtor becomes bound by the security agreement of an original debtor and each debtor has a secured creditor.

Subsection (a) subordinates the original debtor's secured party's security interest perfected against the new debtor by a filed financing statement that would be ineffective to perfect the security interest but for Section 9-508 or, if the original debtor and new debtor are located in different jurisdictions, Section 9-316(i)(1). The security interest is subordinated to security interests in the same collateral perfected by another method, e.g., by filing against the new debtor. This section does not subordinate a security interest perfected by a new initial financing statement providing the name of the new debtor, even if the initial financing statement is filed to maintain the effectiveness of a financing statement under the circumstances described in Section 9-508(b). Nor does it subordinate a security interest perfected by a financing statement filed against the original debtor which remains effective against collateral

transferred by the original debtor to the new debtor. See Section 9-508(c). Concerning priority contests involving transferred collateral, see Sections 9-325 and 9-507.

Example 1: SP-X holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory, and SP-Z holds a perfected-by-possession security interest in an item of Z Corp's inventory. Both X Corp and Z Corp are located in the same jurisdiction under Section 9-307. Z Corp becomes bound as debtor by X Corp's security agreement (e.g., Z Corp buys X Corp's assets and assumes its security agreement). See Section 9-203(d). But for Section 9-508, SP-X's financing statement would be ineffective to perfect a security interest in the item of inventory in which Z Corp has rights. However, subsection (a) provides that SP-X's perfected security interest is subordinate to SP-Z's, regardless of whether SP-X's financing statement was filed before SP-Z perfected its security interest.

Example 2: SP-X holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory, and SP-Z holds a perfected-by-filing security interest in Z Corp's existing and after-acquired inventory. Both X Corp and Z Corp are located in the

same jurisdiction under Section 9-307. Z Corp becomes bound as debtor by X Corp's security agreement. Immediately thereafter, and before the effectiveness of SP-X's financing statement lapses, Z Corp acquires a new item of inventory. But for Section 9-508, SP-X's financing statement would be ineffective to perfect a security interest in the new item of inventory in which Z Corp has rights. However, because SP-Z's security interest was perfected by a filing whose effectiveness does not depend on Section 9-316(i)(1) or 9-508, subsection (a) subordinates SP-X's perfected security interest to SP-Z's. This would be the case even if SP-Z filed after Z Corp became bound by X Corp's security agreement, and regardless of which financing statement was filed first.

The same result would obtain if X Corp and Z Corp were located in different jurisdictions. SP-X's security interest would be perfected by a financing statement that would be ineffective but for Section 9-316(i)(1), whereas the effectiveness of SP-Z's filing does not depend on Section 9-316(i)(1) or 9-508.

3. Other Priority Rules. Subsection (b) addresses the priority among security interests created by the original debtor (X Corp). By invoking the other priority rules of this subpart, as applicable, subsection (b) preserves the relative priority of security interests created by the original debtor.

Example 3: Under the facts of Example 2, SP-Y also holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory. SP-Y filed after SP-X. Inasmuch as both SP-X's and SP-Y's security interests in inventory acquired by Z Corp after it became bound would be unperfected but for the application of Section 9-508, the normal priority rules determine their relative priorities. Under the "first-to-file-or-perfect" rule of Section 9-322(a)(1), SP-X has priority over SP-Y.

Example 4: Under the facts of Example 3, after Z Corp became bound by X Corp's security agreement, SP-Y promptly filed a new initial financing statement against Z Corp. SP-X's security interest remains perfected only by virtue of its original filing against X Corp which "would be ineffective to perfect the security interest but for the application of Section 9-508." Because SP-Y's security interest is perfected by the filing of a financing statement whose effectiveness does not depend on Section 9-508 or 9-316(i)(1), subsection (a) subordinates SP-X's security interest

to SP-Y's. If both SP-X and SP-Y file a new initial financing statement against Z Corp, then the "first-to-file-or-perfect" rule of Section 9-322(a)(1) governs their priority inter se as well as their priority against SP-Z.

The second sentence of subsection (b) effectively limits the applicability of the first sentence to situations in which a new debtor has become bound by more than one security agreement entered into by the *same* original debtor. When the new debtor has become bound by security agreements entered into by *different* original debtors, the second sentence provides that priority is based on priority in time of the new debtor's becoming bound.

Example 5: Under the facts of Example 2, SP-W holds a perfected-by-filing security interest in W Corp's existing and after-acquired inventory. After Z Corp became bound by X Corp's security agreement in favor of SP-X, Z Corp became bound by W Corp's security agreement. Under subsection (b), SP-W's security interest in inventory acquired by Z Corp is subordinate to that of SP-X, because Z Corp became bound under SP-X's security agreement before it became bound under SP-W's security agreement. This is the result regardless of which financing statement (SP-X's or SP-W's) was filed first.

The second sentence of subsection (b) reflects the generally accepted view that priority based on the first-to-file rule is inappropriate for resolving priority disputes when the filings were made against different debtors. Like subsection (a) and the first sentence of subsection (b), however, the second sentence of subsection (b) relates only to priority conflicts among security interests that would be unperfected but for the application of Section 9-316(i)(1) or 9-508.

Example 6: Under the facts of Example 5, after Z Corp became bound by W Corp's security agreement, SP-W promptly filed a new initial financing statement against Z Corp. At that time, SP-X's security interest was perfected only pursuant to its original filing against X Corp which "would be ineffective to perfect the security interest but for the application of Section 9-508." Because SP-W's security interest is perfected by the filing of a financing statement whose effectiveness does not depend on Section 9-316(i)(1) or 9-508, subsection (a) subordinates SP-X's security interest to SP-W's. If both SP-X and SP-W file a new initial financing statement against Z Corp, then the "first-to-file-or-perfect" rule of Section 9-322(a)(1) governs their priority inter se as well as their priority against SP-Z.

28-9-327. Priority of security interests in deposit account. — The following rules govern priority among conflicting security interests in the same deposit account:

(1) A security interest held by a secured party having control of the

deposit account under section 28-9-104[, Idaho Code,] has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in subsections (3) and (4) of this section, security interests perfected by control under section 28-9-314[, Idaho Code,] rank according to priority in time of obtaining control.

(3) Except as otherwise provided in subsection (4) of this section, a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control under section 28-9-104(a)(3)[, Idaho Code,] has priority over a security interest held by the bank with which the deposit account is maintained.

History.

I.C., § 28-9-327, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (1), (2), and (4) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New; derived from former Section 9-115(5).

2. **Scope of This Section.** This section contains the rules governing the priority of conflicting security interests in deposit accounts. It overrides conflicting priority rules. See Sections 9-322(f)(1), 9-324(a), (b), (d), (f). This section does not apply to accounts evidenced by an instrument (e.g., certain certificates of deposit), which by definition are not "deposit accounts."

3. **Control.** Under paragraph (1), security interests perfected by control (Sections 9-314, 9-104) take priority over those perfected otherwise, e.g., as identifiable cash proceeds under Section 9-315. Secured parties for whom the deposit account is an integral part of the credit decision will, at a minimum, insist upon the right to immediate access to the deposit account upon the debtor's default (i.e., control). Those secured parties for whom the deposit account is less essential will not take control, thereby running the risk that the debtor will dispose of funds on deposit (either outright or for collateral purposes) after default but before the account can be frozen by court order or the secured party can obtain control.

Paragraph (2) governs the case (expected to be very rare) in which a bank enters into a Section 9-104(a)(2) control agreement with

more than one secured party. It provides that the security interests rank according to time of obtaining control. If the bank is solvent and the control agreements are well drafted, the bank will be liable to each secured party, and the priority rule will have no practical effect.

4. **Priority of Bank.** Under paragraph (3), the security interest of the bank with which the deposit account is maintained normally takes priority over all other conflicting security interests in the deposit account, regardless of whether the deposit account constitutes the competing secured party's original collateral or its proceeds. A rule of this kind enables banks to extend credit to their depositors without the need to examine either the public record or their own records to determine whether another party might have a security interest in the deposit account.

A secured party who takes a security interest in the deposit account as original collateral can protect itself against the results of this rule in one of two ways. It can take control of the deposit account by becoming the bank's customer. Under paragraph (4), this arrangement operates to subordinate the bank's security interest. Alternatively, the secured party can obtain a subordination agreement from the bank. See Section 9-339.

A secured party who claims the deposit account as proceeds of other collateral can

reduce the risk of becoming junior by obtaining the debtor's agreement to deposit proceeds into a specific cash-collateral account and obtaining the agreement of that bank to subordinate all its claims to those of the secured party. But if the debtor violates its agreement and deposits funds into a deposit account other than the cash-collateral account, the secured party risks being subordinated.

5. Priority in Proceeds of, and Funds

Transferred from, Deposit Account. The priority afforded by this section does not extend to proceeds of a deposit account. Rather, Section 9-322(c) through (e) and the provisions referred to in Section 9-322(f) govern priorities in proceeds of a deposit account. Section 9-315(d) addresses continuation of perfection in proceeds of deposit accounts. As to funds transferred from a deposit account that serves as collateral, see Section 9-332.

28-9-328. Priority of security interests in investment property. —

The following rules govern priority among conflicting security interests in the same investment property:

(1) A security interest held by a secured party having control of investment property under section 28-9-106[, Idaho Code,] has priority over a security interest held by a secured party that does not have control of the investment property.

(2) Except as otherwise provided in subsections (3) and (4) of this section, conflicting security interests held by secured parties each of which has control under section 28-9-106[, Idaho Code,] rank according to priority in time of:

(A) If the collateral is a security, obtaining control;

(B) If the collateral is a security entitlement carried in a securities account and:

(i) if the secured party obtained control under section 28-8-106(4)(a)[, Idaho Code], the secured party's becoming the person for which the securities account is maintained;

(ii) if the secured party obtained control under section 28-8-106(4)(b)[, Idaho Code], the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

(iii) if the secured party obtained control through another person under section 28-8-106(4)(c)[, Idaho Code], the time on which priority would be based under this paragraph if the other person were the secured party; or

(C) If the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in section 28-9-106(b)(2)[, Idaho Code,] with respect to commodity contracts carried or to be carried with the commodity intermediary.

(3) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under section 28-9-313(a)[, Idaho Code,] and

not by control under section 28-9-314[, Idaho Code,] has priority over a conflicting security interest perfected by a method other than control.

(6) Conflicting security interests created by a broker, securities intermediary or commodity intermediary which are perfected without control under section 28-9-106[, Idaho Code,] rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by sections 28-9-322 and 28-9-323[, Idaho Code].

History.

I.C., § 28-9-328, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-115(5).

2. **Scope of This Section.** This section contains the rules governing the priority of conflicting security interests in investment property. Paragraph (1) states the most important general rule—that a secured party who obtains control has priority over a secured party who does not obtain control. Paragraphs (2) through (4) deal with conflicting security interests each of which is perfected by control. Paragraph (5) addresses the priority of a security interest in a certificated security which is perfected by delivery but not control. Paragraph (6) deals with the relatively unusual circumstance in which a broker, securities intermediary, or commodity intermediary has created conflicting security interests none of which is perfected by control. Paragraph (7) provides that the general priority rules of Sections 9-322 and 9-323 apply to cases not covered by the specific rules in this section. The principal application of this residual rule is that the usual first in time of filing rule applies to conflicting security interests that are perfected only by filing. Because the control priority rule of paragraph (1) provides for the ordinary cases in which persons purchase securities on margin credit from their brokers, there is no need for special rules for purchase-money security interests. See also Section 9-103 (limiting purchase-money collateral to goods and software).

3. **General Rule: Priority of Security Interest Perfected by Control.** Under paragraph (1), a secured party who obtains control has priority over a secured party who does not obtain control. The control priority rule does not turn on either temporal se-

quence or awareness of conflicting security interests. Rather, it is a structural rule, based on the principle that a lender should be able to rely on the collateral without question if the lender has taken the necessary steps to assure itself that it is in a position where it can foreclose on the collateral without further action by the debtor. The control priority rule is necessary because the perfection rules provide considerable flexibility in structuring secured financing arrangements. For example, at the “retail” level, a secured lender to an investor who wants the full measure of protection can obtain control, but the creditor may be willing to accept the greater measure of risk that follows from perfection by filing. Similarly, at the “wholesale” level, a lender to securities firms can leave the collateral with the debtor and obtain a perfected security interest under the automatic perfection rule of Section 9-309(10), but a lender who wants to be entirely sure of its position will want to obtain control. The control priority rule of paragraph (1) is an essential part of this system of flexibility. It is feasible to provide more than one method of perfecting security interests only if the rules ensure that those who take the necessary steps to obtain the full measure of protection do not run the risk of subordination to those who have not taken such steps. A secured party who is unwilling to run the risk that the debtor has granted or will grant a conflicting control security interest should not make a loan without obtaining control of the collateral.

As applied to the retail level, the control priority rule means that a secured party who obtains control has priority over a conflicting

security interest perfected by filing without regard to inquiry into whether the control secured party was aware of the filed security interest. Prior to the 1994 revisions to Articles 8 and 9, Article 9 did not permit perfection of security interests in securities by filing. Accordingly, parties who deal in securities never developed a practice of searching the UCC files before conducting securities transactions. Although filing is now a permissible method of perfection, in order to avoid disruption of existing practices in this business it is necessary to give perfection by filing a different and more limited effect for securities than for some other forms of collateral. The priority rules are not based on the assumption that parties who perfect by the usual method of obtaining control will search the files. Quite the contrary, the control priority rule is intended to ensure that, with respect to investment property, secured parties who do obtain control are entirely unaffected by filings. To state the point another way, perfection by filing is intended to affect only general creditors or other secured creditors who rely on filing. The rule that a security interest perfected by filing can be primed by a control security interest, without regard to awareness, is a consequence of the system of perfection and priority rules for investment property. These rules are designed to take account of the circumstances of the securities markets, where filing is not given the same effect as for some other forms of property. No implication is made about the effect of filing with respect to security interests in other forms of property, nor about other Article 9 rules, e.g., Section 9-330, which govern the circumstances in which security interests in other forms of property perfected by filing can be primed by subsequent perfected security interests.

The following examples illustrate the application of the priority rule in paragraph (1):

Example 1: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock for which Debtor has a certificate. Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor delivers the certificate, properly indorsed, to Beta. Alpha and Beta both have perfected security interests in the XYZ Co. stock. Beta has control, see Section 8-106(b)(1), and hence has priority over Alpha.

Example 2: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, held through a securities account with Able & Co.

Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor instructs Able to have the 1000 shares transferred through the clearing corporation to Custodian Bank, to be credited to Beta's account with Custodian Bank. Alpha and Beta both have perfected security interests in the XYZ Co. stock. Beta has control, see Section 8-106(d)(1), and hence has priority over Alpha.

Example 3: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, which is held through a securities account with Able & Co. Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Alpha and Beta both have perfected security interests in the XYZ Co. stock (more precisely, in the Debtor's security entitlement to the financial asset consisting of the XYZ Co. stock). Beta has control, see Section 8-106(d)(2), and hence has priority over Alpha.

Example 4: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, held through a securities account with Able & Co. Alpha perfects by filing. Debtor's agreement with Able & Co. provides that Able has a security interest in all securities carried in the account as security for any obligations of Debtor to Able. Debtor incurs obligations to Able and later defaults on the obligations to Alpha and Able. Able has control by virtue of the rule of Section 8-106(e) that if a customer grants a security interest to its own intermediary, the intermediary has control. Since Alpha does not have control, Able has priority over Alpha under the general control priority rule of paragraph (1).

4. Conflicting Security Interests Perfected by Control: Priority of Securities Intermediary or Commodity Intermediary. Paragraphs (2) through (4) govern the priority of conflicting security interests each of which is perfected by control. The following example explains the application of the rules in paragraphs (3) and (4):

Example 5: Debtor holds securities through a securities account with Able & Co. Debtor's agreement with Able & Co. provides that Able has a security interest in all securi-

ties carried in the account as security for any obligations of Debtor to Able. Debtor borrows from Beta and grants Beta a security interest in 1000 shares of XYZ Co. stock carried in the account. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Debtor incurs obligations to Able and later defaults on the obligations to Beta and Able. Both Beta and Able have control, so the general control priority rule of paragraph (1) does not apply. Compare Example 4. Paragraph (3) provides that a security interest held by a securities intermediary in positions of its own customer has priority over a conflicting security interest of an external lender, so Able has priority over Beta. (Paragraph (4) contains a parallel rule for commodity intermediaries.) The agreement among Able, Beta, and Debtor could, of course, determine the relative priority of the security interests of Able and Beta, see Section 9-339, but the fact that the intermediary has agreed to act on the instructions of a secured party such as Beta does not itself imply any agreement by the intermediary to subordinate.

5. Conflicting Security Interests Perfected by Control: Temporal Priority. Former Section 9-115 introduced into Article 9 the concept of conflicting security interests that rank equally. Paragraph (2) of this section governs priority in those circumstances in which more than one secured party (other than a broker, securities intermediary, or commodity intermediary) has control. It replaces the equal-priority rule for conflicting security interests in investment property with a temporal rule. For securities, both certificated and uncertificated, under paragraph (2)(A) priority is based on the time that control is obtained. For security entitlements carried in securities accounts, the treatment is more complex. Paragraph (2)(B) bases priority on the timing of the steps taken to achieve control. The following example illustrates the application of paragraph (2).

Example 6: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through a securities account with Able & Co. Debtor, Able, and Alpha enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Alpha will also have the right to direct dispositions and receive the proceeds. Later, Debtor borrows from Beta and grants Beta a security interest in all its investment

property, existing and after-acquired. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Alpha and Beta both have perfected-by-control security interests in the security entitlement to the XYZ Co. stock by virtue of their agreements with Able. See Sections 9-314(a), 9-106(a), 8-106(d)(2). Under paragraph (2)(B)(ii), the priority of each security interest dates from the time of the secured party's agreement with Able. Because Alpha's agreement was first in time, Alpha has priority. This priority applies equally to security entitlements to financial assets credited to the account after the agreement was entered into.

The priority rule is analogous to "first-to-file" priority under Section 9-322 with respect to after-acquired collateral. Paragraphs (2)(B)(i) and (2)(B)(iii) provide similar rules for security entitlements as to which control is obtained by other methods, and paragraph (2)(C) provides a similar rule for commodity contracts carried in a commodity account. Section 8-510 also has been revised to provide a temporal priority conforming to paragraph (2)(B).

6. Certificated Securities. A long-standing practice has developed whereby secured parties whose collateral consists of a security evidenced by a security certificate take possession of the security certificate. If the security certificate is in bearer form, the secured party's acquisition of possession constitutes "delivery" under Section 8-301(a)(1), and the delivery constitutes "control" under Section 8-106(a). Comment 5 discusses the priority of security interests perfected by control of investment property.

If the security certificate is in registered form, the secured party will not achieve control over the security unless the security certificate contains an appropriate indorsement or is (re)registered in the secured party's name. See Section 8-106(b). However, the secured party's acquisition of possession constitutes "delivery" of the security certificate under Section 8-301 and serves to perfect the security interest under Section 9-313(a), even if the security certificate has not been appropriately indorsed and has not been (re)registered in the secured party's name. A security interest perfected by this method has priority over a security interest perfected other than by control (e.g., by filing). See paragraph (5).

The priority rule stated in paragraph (5) may seem anomalous, in that it can afford less favorable treatment to purchasers who buy collateral outright than to those who take a security interest in it. For example, a buyer of a security certificate would cut off a secu-

urity interest perfected by filing only if the buyer achieves the status of a protected purchaser under Section 8-303. The buyer would not be a protected purchaser, for example, if it does not obtain "control" under Section 8-106 (e.g., if it fails to obtain a proper indorsement of the certificate) or if it had notice of an adverse claim under Section 8-105. The apparent anomaly disappears, however, when one understands the priority rule not as one intended to protect careless or guilty parties, but as one that eliminates the need to conduct a search of the public records only insofar as necessary to serve the needs of the securities markets.

7. Secured Financing of Securities Firms. Priority questions concerning security interests granted by brokers and securities intermediaries are governed by the general control-beats-non-control priority rule of paragraph (1), as supplemented by the special rules set out in paragraphs (2) (temporal priority-first to control), (3) (special priority for securities intermediary), and (6) (equal priority for non-control). The following examples illustrate the priority rules as applied to this setting. (In all cases it is assumed that the debtor retains sufficient other securities to satisfy all customers' claims. This section deals with the relative rights of secured lenders to a securities firm. Disputes between a secured lender and the firm's own customers are governed by Section 8-511.)

Example 7: Able & Co., a securities dealer, enters into financing arrangements with two lenders, Alpha Bank and Beta Bank. In each case the agreements provide that the lender will have a security interest in the securities identified on lists provided to the lender on a daily basis, that the debtor will deliver the securities to the lender on demand, and that the debtor will not list as collateral any securities which the debtor has pledged to any other lender. Upon Able's insolvency it is discovered that Able has listed the same securities on the collateral lists provided to both Alpha and Beta. Alpha and Beta both have perfected security interests under the automatic-perfection rule of Section 9-309(10). Neither Alpha nor Beta has control. Paragraph (6) provides that the security interests of Alpha and Beta rank equally, because each of them has a non-control security interest granted by a securities firm. They share pro-rata.

Example 8: Able enters into financing arrangements, with Alpha Bank and Beta Bank as in Example 7. At some point, however, Beta decides that it is unwilling to continue to provide financing on a non-control basis. Able directs the clearing corporation where it holds its principal inventory of securities to move specified securities into Beta's account. Upon Able's insolvency it is discovered that a list of

collateral provided to Alpha includes securities that had been moved to Beta's account. Both Alpha and Beta have perfected security interests; Alpha under the automatic-perfection rule of Section 9-309(10), and Beta under that rule and also the perfection-by-control rule in Section 9-314(a). Beta has control but Alpha does not. Beta has priority over Alpha under paragraph (1).

Example 9: Able & Co. carries its principal inventory of securities through Clearing Corporation, which offers a "shared control" facility whereby a participant securities firm can enter into an arrangement with a lender under which the securities firm will retain the power to trade and otherwise direct dispositions of securities carried in its account, but Clearing Corporation agrees that, at any time the lender so directs, Clearing Corporation will transfer any securities from the firm's account to the lender's account or otherwise dispose of them as directed by the lender. Able enters into financing arrangements with two lenders, Alpha and Beta, each of which obtains such a control agreement from Clearing Corporation. The agreement with each lender provides that Able will designate specific securities as collateral on lists provided to the lender on a daily or other periodic basis, and that it will not pledge the same securities to different lenders. Upon Able's insolvency, it is discovered that Able has listed the same securities on the collateral lists provided to both Alpha and Beta. Both Alpha and Beta have control over the disputed securities. Paragraph (2) awards priority to whichever secured party first entered into the agreement with Clearing Corporation.

8. Relation to Other Law. Section 1-103 provides that "unless displaced by particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." There may be circumstances in which a secured party's action in acquiring a security interest that has priority under this section constitutes conduct that is wrongful under other law. Though the possibility of such resort to other law may provide an appropriate "escape valve" for cases of egregious conduct, care must be taken to ensure that this does not impair the certainty and predictability of the priority rules. Whether a court may appropriately look to other law to impose liability upon or estop a secured party from asserting its Article 9 priority depends on an assessment of the secured party's conduct under the standards established by such other law as well as a determination of whether the particular application of such other law is displaced by the UCC.

Some circumstances in which other law is clearly displaced by the UCC rules are readily identifiable. Common law "first in time, first in right" principles, or correlative tort liability

rules such as common law conversion principles under which a purchaser may incur liability to a person with a prior property interest without regard to awareness of that claim, are necessarily displaced by the priority rules set out in this section since these rules determine the relative ranking of security interests in investment property. So too, Article 8 provides protections against adverse claims to certain purchasers of interests in investment property. In circumstances where a secured party not only has priority under Section 9-328, but also qualifies for protection against adverse claims under Section 8-303, 8-502, or 8-510, resort to other law would be precluded.

In determining whether it is appropriate in a particular case to look to other law, account must also be taken of the policies that underlie the commercial law rules on securities markets and security interests in securities. A principal objective of the 1994 revision of Article 8 and the provisions of Article 9 governing investment property was to ensure that secured financing transactions can be implemented on a simple, timely, and certain basis. One of the circumstances that led to the revision was the concern that uncertainty in the application of the rules on secured transactions involving securities and other finan-

cial assets could contribute to systemic risk by impairing the ability of financial institutions to provide liquidity to the markets in times of stress. The control priority rule is designed to provide a clear and certain rule to ensure that lenders who have taken the necessary steps to establish control do not face a risk of subordination to other lenders who have not done so.

The control priority rule does not turn on an inquiry into the state of a secured party's awareness of potential conflicting claims because a rule under which a person's rights depended on that sort of after-the-fact inquiry could introduce an unacceptable measure of uncertainty. If an inquiry into awareness could provide a complete and satisfactory resolution of the problem in all cases, the priority rules of this section would have incorporated that test. The fact that they do not necessarily means that resort to other law based solely on that factor is precluded, though the question whether a control secured party induced or encouraged its financing arrangement with actual knowledge that the debtor would be violating the rights of another secured party may, in some circumstances, appropriately be treated as a factor in determining whether the control party's action is the kind of egregious conduct for which resort to other law is appropriate.

28-9-329. Priority of security interests in letter of credit right. —

The following rules govern priority among conflicting security interests in the same letter of credit right:

(1) A security interest held by a secured party having control of the letter of credit right under section 28-9-107[, Idaho Code,] has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control.

(2) Security interests perfected by control under section 28-9-314[, Idaho Code,] rank according to priority in time of obtaining control.

History.

I.C., § 28-9-329, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (1) and (2) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New; loosely modeled after former Section 9-115(5).

2. **General Rule.** Paragraph (1) awards priority to a secured party who perfects a security interest directly in letter-of-credit

rights (i.e., one that takes an assignment of proceeds and obtains consent of the issuer or any nominated person under Section 5-114(c)) over another conflicting security interest (i.e., one that is perfected automatically in the

letter-of-credit rights as supporting obligations under Section 9-308(d)). This is consistent with international letter-of-credit practice and provides finality to payments made to recognized assignees of letter-of-credit proceeds. If an issuer or nominated person recognizes multiple security interests in a letter-of-credit right, resulting in multiple parties having control (Section 9-107), under paragraph (2) the security interests rank according to the time of obtaining control.

3. Drawing Rights; Transferee Beneficiaries. Drawing under a letter of credit is personal to the beneficiary and requires the beneficiary to perform the conditions for drawing under the letter of credit. Accordingly, a beneficiary's grant of a security interest in a letter of credit includes the beneficiary's "letter-of-credit right" as defined in Section 9-102 and the right to "proceeds of [the] letter of credit" as defined in Section 5-114(a), but does not include the right to demand payment under the letter of credit.

Section 5-114(e) provides that the "[r]ights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds." To the extent the rights of a transferee beneficiary or nominated person are independent and superior, this Article does not apply. See Section 9-109(c).

Under Article 5, there is in effect a novation upon the transfer with the issuer becoming bound on a new, independent obligation to the transferee. The rights of nominated persons and transferee beneficiaries under a letter of credit include the right to demand payment from the issuer. Under Section 5-114(e), their rights to payment are independent of their obligations to the beneficiary (or original beneficiary) and superior to the rights of assignees of letter-of-credit proceeds (Section 5-114(c)) and others claiming a security interest in the beneficiary's (or original beneficiary's) letter-of-credit rights.

A transfer of drawing rights under a transferable letter of credit establishes independent Article 5 rights in the transferee and does not create or perfect an Article 9 security interest in the transferred drawing rights. The definition of "letter-of-credit right" in Section 9-102 excludes a beneficiary's drawing rights. The exercise of drawing rights by a transferee beneficiary may breach a contractual obligation of the transferee to the original beneficiary concerning when and how much the transferee may draw or how it may use the funds received under the letter of credit. If, for example, drawing rights are transferred to support a sale or loan from the transferee to the original beneficiary, then the transferee would be obligated to the original beneficiary under the sale or loan agreement

to account for any drawing and for the use of any funds received. The transferee's obligation would be governed by the applicable law of contracts or restitution.

4. Secured Party-Transferee Beneficiaries. As described in Comment 3, drawing rights under letters of credit are transferred in many commercial contexts in which the transferee is not a secured party claiming a security interest in an underlying receivable supported by the letter of credit. Consequently, a transfer of a letter of credit is not a method of "perfection" of a security interest. The transferee's independent right to draw under the letter of credit and to receive and retain the value thereunder (in effect, priority) is not based on Article 9 but on letter-of-credit law and the terms of the letter of credit. Assume, however, that a secured party does hold a security interest in a receivable that is owned by a beneficiary-debtor and supported by a transferable letter of credit. Assume further that the beneficiary-debtor causes the letter of credit to be transferred to the secured party, the secured party draws under the letter of credit, and, upon the issuer's payment to the secured party-transferee, the underlying account debtor's obligation to the original beneficiary-debtor is satisfied. In this situation, the payment to the secured party-transferee is proceeds of the receivable collected by the secured party-transferee. Consequently, the secured party-transferee would have certain duties to the debtor and third parties under Article 9. For example, it would be obliged to collect under the letter of credit in a commercially reasonable manner and to remit any surplus pursuant to Sections 9-607 and 9-608.

This scenario is problematic under letter-of-credit law and practice, inasmuch as a transferee beneficiary collects in its own right arising from its own performance. Accordingly, under Section 5-114, the independent and superior rights of a transferee control over any inconsistent duties under Article 9. A transferee beneficiary may take a transfer of drawing rights to avoid reliance on the original beneficiary's credit and collateral, and it may consider any Article 9 rights superseded by its Article 5 rights. Moreover, it will not always be clear (i) whether a transferee beneficiary has a security interest in the underlying collateral, (ii) whether any security interest is senior to the rights of others, or (iii) whether the transferee beneficiary is aware that it holds a security interest. There will be clear cases in which the role of a transferee beneficiary as such is merely incidental to a conventional secured financing. There also will be cases in which the existence of a security interest may have little to do with the position of a transferee beneficiary as such. In dealing with these cases and less

clear cases involving the possible application of Article 9 to a nominated person or a transferee beneficiary, the right to demand payment under a letter of credit should be distinguished from letter-of-credit rights. The

courts also should give appropriate consideration to the policies and provisions of Article 5 and letter-of-credit practice as well as Article 9.

28-9-330. Priority of purchaser of chattel paper or instrument. —

(a) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) In good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under section 28-9-105[, Idaho Code]; and

(2) The chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.

(b) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under section 28-9-105[, Idaho Code,] in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

(c) Except as otherwise provided in section 28-9-327[, Idaho Code], a purchaser having priority in chattel paper under subsection (a) or (b) of this section also has priority in proceeds of the chattel paper to the extent that:

(1) Section 28-9-322[, Idaho Code,] provides for priority in the proceeds; or

(2) The proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected.

(d) Except as otherwise provided in section 28-9-331(a)[, Idaho Code], a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

(e) For purposes of subsections (a) and (b) of this section, the holder of a purchase-money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory.

(f) For purposes of subsections (b) and (d) of this section, if chattel paper or an instrument indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the purchase violates the rights of the secured party.

History.

I.C., § 28-9-330, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. Former Section 9-308.

2. Non-Temporal Priority. This Article permits a security interest in chattel paper or instruments to be perfected either by filing or by the secured party's taking possession. This section enables secured parties and other purchasers of chattel paper (both electronic and tangible) and instruments to obtain priority over earlier-perfected security interests, thereby promoting the negotiability of these types of receivables.

3. Chattel Paper. Subsections (a) and (b) follow former Section 9-308 in distinguishing between earlier-perfected security interests in chattel paper that is claimed merely as proceeds of inventory subject to a security interest and chattel paper that is claimed other than merely as proceeds. Like former Section 9-308, this section does not elaborate upon the phrase "merely as proceeds." For an elaboration, see PEB Commentary No. 8.

This section makes explicit the "good faith" requirement and retains the requirements of "the ordinary course of the purchaser's business" and the giving of "new value" as conditions for priority. Concerning the last, this Article deletes former Section 9-108 and adds to Section 9-102 a completely different definition of the term "new value." Under subsection (e), the holder of a purchase-money security interest in inventory is deemed to give "new value" for chattel paper constituting the proceeds of the inventory. Accordingly, the purchase-money secured party may qualify for priority in the chattel paper under subsection (a) or (b), whichever is applicable, even if it does not make an additional advance against the chattel paper.

If a possessory security interest in tangible chattel paper or a perfected-by-control security interest in electronic chattel paper does not qualify for priority under this section, it may be subordinate to a perfected-by-filing security interest under Section 9-322(a)(1).

4. Possession and Control. To qualify for priority under subsection (a) or (b), a purchaser must "take[] possession of the chattel paper or obtain[] control of the chattel paper under Section 9-105." When chattel paper comprises one or more tangible records and one or more electronic records, a purchaser may satisfy the possession-or-control requirement by taking possession of the tangible records under Section 9-313 and having con-

trol of the electronic records under Section 9-105. In determining which of several related records constitutes chattel paper and thus is relevant to possession or control, the form of the records is irrelevant. Rather, the touchstone is whether possession or control of the record would afford the public notice contemplated by the possession and control requirements. For example, because possession or control of an amendment extending the term of a lease would not afford the contemplated public notice, the amendment would not constitute chattel paper regardless of whether the amendment is in tangible form and the lease is in electronic form, the amendment is electronic and the lease is tangible, the amendment and lease are both tangible, or the amendment and lease are both electronic.

Two common practices have raised particular concerns with respect to the possession requirement. First, in some cases the parties create more than one copy or counterpart of chattel paper evidencing a single secured obligation or lease. This practice raises questions as to which counterpart is the "original" and whether it is necessary for a purchaser to take possession of all counterparts in order to "take possession" of the chattel paper. Second, parties sometimes enter into a single "master" agreement. The master agreement contemplates that the parties will enter into separate "schedules" from time to time, each evidencing chattel paper. Must a purchaser of an obligation or lease evidenced by a single schedule also take possession of the master agreement as well as the schedule in order to "take possession" of the chattel paper?

The problem raised by the first practice is easily solved. The parties may in the terms of their agreement and by designation on the chattel paper identify only one counterpart as the original chattel paper for purposes of taking possession of the chattel paper. Concerns about the second practice also are easily solved by careful drafting. Each schedule should provide that it incorporates the terms of the master agreement, not the other way around. This will make it clear that each schedule is a "stand alone" document.

A secured party may wish to convert tangible chattel paper to electronic chattel paper and vice versa. The priority of a security interest in chattel paper under subsection (a)

or (b) may be preserved, even if the form of the chattel paper changes. The principle implied in the preceding paragraph, i.e., that not every copy of chattel paper is relevant, applies to “control” as well as to “possession.” When there are multiple copies of chattel paper, a secured party may take “possession” or obtain “control” of the chattel paper if it acts with respect to the copy or copies that are reliably identified as the copy or copies that are relevant for purposes of possession or control. This principle applies as well to chattel paper that has been converted from one form to another, even if the relevant copies are not the “original” chattel paper.

5. Chattel Paper Claimed Merely as Proceeds. Subsection (a) revises the rule in former Section 9-308(b) to eliminate reference to what the purchaser knows. Instead, a purchaser who meets the possession or control, ordinary course, and new value requirements takes priority over a competing security interest unless the chattel paper itself indicates that it has been assigned to an identified assignee other than the purchaser. Thus subsection (a) recognizes the common practice of placing a “legend” on chattel paper to indicate that it has been assigned. This approach, under which the chattel paper purchaser who gives new value in ordinary course can rely on possession of unlegended, tangible chattel paper without any concern for other facts that it may know, comports with the expectations of both inventory and chattel paper financiers.

6. Chattel Paper Claimed Other Than Merely as Proceeds. Subsection (b) eliminates the requirement that the purchaser take without knowledge that the “specific paper” is subject to the security interest and substitutes for it the requirement that the purchaser take “without knowledge that the purchase violates the rights of the secured party.” This standard derives from the definition of “buyer in ordinary course of business” in Section 1-201(b)(9). The source of the purchaser’s knowledge is irrelevant. Note, however, that “knowledge” means “actual knowledge.” Section 1-202(b).

In contrast to a junior secured party in accounts, who may be required in some special circumstances to undertake a search under the “good faith” requirement, see Comment 5 to Section 9-331, a purchaser of chattel paper under this section is not required as a matter of good faith to make a search in order to determine the existence of prior security interests. There may be circumstances where the purchaser undertakes a search nevertheless, either on its own volition or because other considerations make it advisable to do so, e.g., where the purchaser also is purchasing accounts. Without more, a purchaser of chattel paper who has seen a financing statement covering the chattel paper or

who knows that the chattel paper is encumbered with a security interest, does not have knowledge that its purchase violates the secured party’s rights. However, if a purchaser sees a statement in a financing statement to the effect that a purchase of chattel paper from the debtor would violate the rights of the filed secured party, the purchaser would have such knowledge. Likewise, under new subsection (f), if the chattel paper itself indicates that it had been assigned to an identified secured party other than the purchaser, the purchaser would have wrongful knowledge for purposes of subsection (b), thereby preventing the purchaser from qualifying for priority under that subsection, even if the purchaser did not have actual knowledge. In the case of tangible chattel paper, the indication normally would consist of a written legend on the chattel paper. In the case of electronic chattel paper, this Article leaves to developing market and technological practices the manner in which the chattel paper would indicate an assignment.

7. Instruments. Subsection (d) contains a special priority rule for instruments. Under this subsection, a purchaser of an instrument has priority over a security interest perfected by a method other than possession (e.g., by filing, temporarily under Section 9-312(e) or (g), as proceeds under Section 9-315(d), or automatically upon attachment under Section 9-309(4) if the security interest arises out of a sale of the instrument) if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party. Generally, to the extent subsection (d) conflicts with Section 3-306, subsection (d) governs. See Section 3-102(b). For example, notice of a conflicting security interest precludes a purchaser from becoming a holder in due course under Section 3-302 and thereby taking free of all claims to the instrument under Section 3-306. However, a purchaser who takes even with knowledge of the security interest qualifies for priority under subsection (d) if it takes without knowledge that the purchase violates the rights of the holder of the security interest. Likewise, a purchaser qualifies for priority under subsection (d) if it takes for “value” as defined in Section 1-201, even if it does not take for “value” as defined in Section 3-303.

Subsection (d) is subject to Section 9-331(a), which provides that Article 9 does not limit the rights of a holder in due course under Article 3. Thus, in the rare case in which the purchaser of an instrument qualifies for priority under subsection (d), but another person has the rights of a holder in due course of the instrument, the other person takes free of the purchaser’s claim. See Section 3-306.

The rule in subsection (d) is similar to the rules in subsections (a) and (b), which govern priority in chattel paper. The observations in Comment 6 concerning the requirement of good faith and the phrase “without knowledge that the purchase violates the rights of the secured party” apply equally to purchasers of instruments. However, unlike a purchaser of chattel paper, to qualify for priority under this section a purchaser of an instrument need only give “value” as defined in Section 1-201; it need not give “new value.” Also, the purchaser need not purchase the instrument in the ordinary course of its business.

Subsection (d) applies to checks as well as notes. For example, to collect and retain checks that are proceeds (collections) of accounts free of a senior secured party's claim to the same checks, a junior secured party must satisfy the good-faith requirement (honesty in fact and the observance of reasonable commercial standards of fair dealing) of this subsection. This is the same good-faith requirement applicable to holders in due course. See Section 9-331, Comment 5.

8. Priority in Proceeds of Chattel Paper. Subsection (c) sets forth the two circumstances under which the priority afforded to a purchaser of chattel paper under subsection (a) or (b) extends also to proceeds of the chattel paper. The first is if the purchaser would have priority under the normal priority rules applicable to proceeds. The second, which the following Comments discuss in greater detail, is if the proceeds consist of the specific goods covered by the chattel paper. Former Article 9 generally was silent as to the priority of a security interest in proceeds when a purchaser qualifies for priority under Section 9-308 (but see former Section 9-306(5)(b), concerning returned and repossessed goods).

9. Priority in Returned and Repossessed Goods. Returned and repossessed goods may constitute proceeds of chattel paper. The following Comments explain the treatment of returned and repossessed goods as proceeds of chattel paper. The analysis is consistent with that of PEB Commentary No. 5, which these Comments replace, and is based upon the following example:

Example: SP-1 has a security interest in all the inventory of a dealer in goods (Dealer); SP-1's security interest is perfected by filing. Dealer sells some of its inventory to a buyer in the ordinary course of business (BIOCOB) pursuant to a conditional sales contract (chattel paper) that does not indicate that it has been assigned to SP-1. SP-2 purchases the chattel paper from Dealer and takes possession of the paper in good faith, in the ordinary course of business, and without knowledge that the purchase violates the rights of SP-1. Subsequently, BIOCOB returns the goods to

Dealer because they are defective. Alternatively, Dealer acquires possession of the goods following BIOCOB's default.

10. Assignment of Non-Lease Chattel Paper.

a. Loan by SP-2 to Dealer Secured by Chattel Paper (or Functional Equivalent Pursuant to Recourse Arrangement).

(1) Returned Goods. If BIOCOB returns the goods to Dealer for repairs, Dealer is merely a bailee and acquires thereby no meaningful rights in the goods to which SP-1's security interest could attach. (Although SP-1's security interest could attach to Dealer's interest as a bailee, that interest is not likely to be of any particular value to SP-1.) Dealer is the owner of the chattel paper (i.e., the owner of a right to payment secured by a security interest in the goods); SP-2 has a security interest in the chattel paper, as does SP-1 (as proceeds of the goods under Section 9-315). Under Section 9-330, SP-2's security interest in the chattel paper is senior to that of SP-1. SP-2 enjoys this priority regardless of whether, or when, SP-2 filed a financing statement covering the chattel paper. Because chattel paper and goods represent different types of collateral, Dealer does not have any meaningful interest in goods to which either SP-1's or SP-2's security interest could attach in order to secure Dealer's obligations to either creditor. See Section 9-102 (defining “chattel paper” and “goods”).

Now assume that BIOCOB returns the goods to Dealer under circumstances whereby Dealer once again becomes the owner of the goods. This would be the case, for example, if the goods were defective and BIOCOB was entitled to reject or revoke acceptance of the goods. See Sections 2-602 (rejection), 2-608 (revocation of acceptance). Unless BIOCOB has waived its defenses as against assignees of the chattel paper, SP-1's and SP-2's rights against BIOCOB would be subject to BIOCOB's claims and defenses. See Sections 9-403, 9-404. SP-1's security interest would attach again because the returned goods would be proceeds of the chattel paper. Dealer's acquisition of the goods easily can be characterized as “proceeds” consisting of an “in kind” collection on or distribution on account of the chattel paper. See Section 9-102 (definition of “proceeds”). Assuming that SP-1's security interest is perfected by filing against the goods and that the filing is made in the same office where a filing would be made against the chattel paper, SP-1's security interest in the goods would remain perfected beyond the 20-day period of automatic perfection. See Section 9-315(d).

Because Dealer's newly reacquired interest in the goods is proceeds of the chattel paper, SP-2's security interest also would attach in the goods as proceeds. If SP-2 had perfected

its security interest in the chattel paper by filing (again, assuming that filing against the chattel paper was made in the same office where a filing would be made against the goods), SP-2's security interest in the reacquired goods would be perfected beyond 20 days. See Section 9-315(d). However, if SP-2 had relied only on its possession of the chattel paper for perfection and had not filed against the chattel paper or the goods, SP-2's security interest would be unperfected after the 20-day period. See Section 9-315(d). Nevertheless, SP-2's unperfected security interest in the goods would be senior to SP-1's security interest under Section 9-330(c). The result in this priority contest is not affected by SP-2's acquiescence or non-acquiescence in the return of the goods to Dealer.

(2) **Repossession Goods.** As explained above, Dealer owns the chattel paper covering the goods, subject to security interests in favor of SP-1 and SP-2. In Article 9 parlance, Dealer has an interest in chattel paper, not goods. If Dealer, SP-1, or SP-2 repossesses the goods upon BIOCOP's default, whether the repossession is rightful or wrongful as among Dealer, SP-1, or SP-2, Dealer's interest will not change. The location of goods and the party who possesses them does not affect the fact that Dealer's interest is in chattel paper, not goods. The goods continue to be owned by BIOCOP. SP-1's security interest in the goods does not attach until such time as Dealer reacquires an interest (other than a bare possessory interest) in the goods. For example, Dealer might buy the goods at a foreclosure sale from SP-2 (whose security interest in the chattel paper is senior to that of SP-1); that disposition would cut off BIOCOP's rights in the goods. Section 9-617.

In many cases the matter would end upon sale of the goods to Dealer at a foreclosure sale and there would be no priority contest between SP-1 and SP-2; Dealer would be unlikely to buy the goods under circumstances whereby SP-2 would retain its security interest. There can be exceptions, however. For example, Dealer may be obliged to purchase the goods from SP-2 and SP-2 may be obliged to convey the goods to Dealer, but Dealer may fail to pay SP-2. Or, one could imagine that SP-2, like SP-1, has a general security interest in the inventory of Dealer. In the latter case, SP-2 should not receive the benefit of any special priority rule, since its interest in no way derives from priority under Section 9-330. In the former case, SP-2's security interest in the goods reacquired by Dealer is senior to SP-1's security interest under Section 9-330.

b. Dealer's Outright Sale of Chattel Paper to SP-2. Article 9 also applies to a transaction whereby SP-2 buys the chattel paper in an outright sale transaction without recourse

against Dealer. Sections 1-201(37), 9-109(a). Although Dealer does not, in such a transaction, retain any residual ownership interest in the chattel paper, the chattel paper constitutes proceeds of the goods to which SP-1's security interest will attach and continue following the sale of the goods. Section 9-315(a). Even though Dealer has not retained any interest in the chattel paper, as discussed above BIOCOP subsequently may return the goods to Dealer under circumstances whereby Dealer reacquires an interest in the goods. The priority contest between SP-1 and SP-2 will be resolved as discussed above; Section 9-330 makes no distinction among purchasers of chattel paper on the basis of whether the purchaser is an outright buyer of chattel paper or one whose security interest secures an obligation of Dealer.

11. Assignment of Lease Chattel Paper. As defined in Section 9-102, "chattel paper" includes not only writings that evidence security interests in specific goods but also those that evidence true leases of goods.

The analysis with respect to lease chattel paper is similar to that set forth above with respect to non-lease chattel paper. It is complicated, however, by the fact that, unlike the case of chattel paper arising out of a sale, Dealer retains a residual interest in the goods. See Section 2A-103(1)(q) (defining "lessor's residual interest"); *In re Leasing Consultants, Inc.*, 486 F.2d 367 (2d Cir. 1973) (lessor's residual interest under true lease is an interest in goods and is a separate type of collateral from lessor's interest in the lease). If Dealer leases goods to a "lessee in ordinary course of business" (LIOCOP), then LIOCOP takes its interest under the lease (i.e., its "leasehold interest") free of the security interest of SP-1. See Sections 2A-307(3), 2A-103(1)(m) (defining "leasehold interest"), (1)(o) (defining "lessee in ordinary course of business"). SP-1 would, however, retain its security interest in the residual interest. In addition, SP-1 would acquire an interest in the lease chattel paper as proceeds. If Dealer then assigns the lease chattel paper to SP-2, Section 9-330 gives SP-2 priority over SP-1 with respect to the chattel paper, *but not* with respect to the residual interest in the goods. Consequently, assignees of lease chattel paper typically take a security interest in and file against the lessor's residual interest in goods, expecting their priority in the goods to be governed by the first-to-file-or-perfect rule of Section 9-322.

If the goods are returned to Dealer, other than upon expiration of the lease term, then the security interests of both SP-1 and SP-2 normally would attach to the goods as proceeds of the chattel paper. (If the goods are returned to Dealer at the expiration of the lease term and the lessee has made all pay-

ments due under the lease, however, then Dealer no longer has any rights under the chattel paper. Dealer's interest in the goods consists solely of its residual interest, as to which SP-2 has no claim.) This would be the case, for example, when the lessee rescinds the lease or when the lessor recovers possession in the exercise of its remedies under Article 2A. See, e.g., Section 2A-525. If SP-2 enjoyed priority in the chattel paper under Section 9-330, then SP-2 likewise would enjoy priority in the returned goods as proceeds. This does not mean that SP-2 necessarily is entitled to the entire value of the returned goods. The value of the goods represents the

sum of the present value of (i) the value of their use for the term of the lease and (ii) the value of the residual interest. SP-2 has priority in the former, but SP-1 ordinarily would have priority in the latter. Thus, an allocation of a portion of the value of the goods to each component may be necessary. Where, as here, one secured party has a security interest in the lessor's residual interest and another has a priority security interest in the chattel paper, it may be advisable for the conflicting secured parties to establish a method for making such an allocation and otherwise to determine their relative rights in returned goods by agreement.

28-9-331. Priority of rights of purchasers of instruments, documents and securities under other chapters — Priority of interests in financial assets and security entitlements under chapter 8. —

(a) This chapter does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in chapters 3, 7 and 8[, title 28, Idaho Code].

(b) This chapter does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under chapter 8[, title 28, Idaho Code].

(c) Filing under this chapter does not constitute notice of a claim or defense to the holders, or purchasers, or persons described in subsections (a) and (b) of this section.

History.

I.C., § 28-9-331, as added by 2001, ch. 208, § 2, p. 704

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions at the end of subsections (a) and (b) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-309.

2. **"Priority."** In some provisions, this Article distinguishes between claimants that take collateral free of a security interest (in the sense that the security interest no longer encumbers the collateral) and those that take an interest in the collateral that is senior to a surviving security interest. See, e.g., Section 9-317. Whether a holder or purchaser referred to in this section takes free or is senior to a security interest depends on whether the purchaser is a buyer of the collateral or takes

a security interest in it. The term "priority" is meant to encompass both scenarios, as it does in Section 9-330.

3. **Rights Acquired by Purchasers.** The rights to which this section refers are set forth in Sections 3-305 and 3-306 (holder in due course), 7-502 (holder to whom a negotiable document of title has been duly negotiated), and 8-303 (protected purchaser). The holders and purchasers referred to in this section do not always take priority over a security interest. See, e.g., Section 7-503 (affording para-

mount rights to certain owners and secured parties as against holder to whom a negotiable document of title has been duly negotiated). Accordingly, this section adds the clause, "to the extent provided in Articles 3, 7, and 8" to former Section 9-309.

4. Financial Assets and Security Entitlements. New subsection (b) provides explicit protection for those who deal with financial assets and security entitlements and who are immunized from liability under Article 8. See, e.g., Sections 8-502, 8-503(e), 8-510, 8-511. The new subsection makes explicit in Article 9 what is implicit in former Article 9 and explicit in several provisions of Article 8. It does not change the law.

5. Collections by Junior Secured Party. Under this section, a secured party with a junior security interest in receivables (accounts, chattel paper, promissory notes, or payment intangibles) may collect and retain the proceeds of those receivables free of the claim of a senior secured party to the same receivables, if the junior secured party is a holder in due course of the proceeds. In order to qualify as a holder in due course, the junior must satisfy the requirements of Section 3-302, which include taking in "good faith." This means that the junior not only must act "honestly" but also must observe "reasonable commercial standards of fair dealing" under the particular circumstances. See Section 9-102(a). Although "good faith" does not impose a general duty of inquiry, e.g., a search of the records in filing offices, there may be circumstances in which "reasonable commercial standards of fair dealing" would require such a search.

Consider, for example, a junior secured party in the business of financing or buying accounts who fails to undertake a search to determine the existence of prior security interests. Because a search, under the usages of trade of that business, would enable it to know or learn upon reasonable inquiry that collecting the accounts violated the rights of a senior secured party, the junior may fail to meet the good-faith standard. See *Utility Contractors Financial Services, Inc. v. Amsouth Bank, NA*, 985 F.2d 1554 (11th Cir. 1993). Likewise, a junior secured party who collects accounts when it knows or should

know under the particular circumstances that doing so would violate the rights of a senior secured party, because the debtor had agreed not to grant a junior security interest in, or sell, the accounts, may not meet the good-faith test. Thus, if a junior secured party conducted or should have conducted a search and a financing statement filed on behalf of the senior secured party states such a restriction, the junior's collection would not meet the good-faith standard. On the other hand, if there was a course of performance between the senior secured party and the debtor which placed no such restrictions on the debtor and allowed the debtor to collect and use the proceeds without any restrictions, the junior secured party may then satisfy the requirements for being a holder in due course. This would be more likely in those circumstances where the junior secured party was providing additional financing to the debtor on an ongoing basis by lending against or buying the accounts and had no notice of any restrictions against doing so. Generally, the senior secured party would not be prejudiced because the practical effect of such payment to the junior secured party is little different than if the debtor itself had made the collections and subsequently paid the secured party from the debtor's general funds. Absent collusion, the junior secured party would take the funds free of the senior security interests. See Section 9-332. In contrast, the senior secured party is likely to be prejudiced if the debtor is going out of business and the junior secured party collects the accounts by notifying the account debtors to make payments directly to the junior. Those collections may not be consistent with "reasonable commercial standards of fair dealing."

Whether the junior secured party qualifies as a holder in due course is fact-sensitive and should be decided on a case-by-case basis in the light of those circumstances. Decisions such as *Financial Management Services Inc. v. Familian*, 905 P.2d 506 (Ariz. App. Div. 1995) (finding holder in due course status) could be determined differently under this application of the good-faith requirement.

The concepts addressed in this Comment are also applicable to junior secured parties as purchasers of instruments under Section 9-330(d). See Section 9-330, Comment 7.

28-9-332. Transfer of money — Transfer of funds from deposit account. — (a) A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(b) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

History.

I.C., § 28-9-332, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES**Effective Dates.**

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT**1. Source.** New.

2. Scope of This Section. This section affords broad protection to transferees who take funds from a deposit account and to those who take money. The term “transferee” is not defined; however, the debtor itself is not a transferee. Thus this section does not cover the case in which a debtor withdraws money (currency) from its deposit account or the case in which a bank debits an encumbered account and credits another account it maintains for the debtor.

A transfer of funds from a deposit account, to which subsection (b) applies, normally will be made by check, by funds transfer, or by debiting the debtor’s deposit account and crediting another depositor’s account.

Example 1: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. Debtor draws a check on the account, payable to Payee. Inasmuch as the check is not the proceeds of the deposit account (it is an order to pay funds from the deposit account), Lender’s security interest in the deposit account does not give rise to a security interest in the check. Payee deposits the check into its own deposit account, and Bank A pays it. Unless Payee acted in collusion with Debtor in violating Lender’s rights, Payee takes the funds (the credits running in favor of Payee) free of Lender’s security interest. This is true regardless of whether Payee is a holder in due course of the check and even if Payee gave no value for the check.

Example 2: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. At Bank B’s suggestion, Debtor moves the funds from the account at Bank A to Debtor’s deposit account with Bank B. Unless Bank B acted in collusion with Debtor in violating Lender’s rights, Bank B takes the funds (the credits running in favor of Bank B) free from Lender’s security interest. See subsection (b). However, inasmuch as the deposit account maintained with Bank B constitutes the proceeds of the deposit account at Bank A, Lender’s security interest would attach to that account as proceeds. See Section 9-315.

Subsection (b) also would apply if, in the example, Bank A debited Debtor’s deposit account in exchange for the issuance of Bank A’s cashier’s check. Lender’s security interest would attach to the cashier’s check as proceeds of the deposit account, and the rules applicable to instruments would govern any competing claims to the cashier’s check. See, e.g., Sections 3-306, 9-322, 9-330, 9-331.

If Debtor withdraws money (currency) from an encumbered deposit account and transfers the money to a third party, then subsection (a), to the extent not displaced by federal law relating to money, applies. It contains the same rule as subsection (b).

Subsection (b) applies to *transfers of funds from* a deposit account; it does not apply to *transfers of the deposit account* itself or of an interest therein. For example, this section does not apply to the creation of a security interest in a deposit account. Competing claims to the deposit account itself are dealt with by other Article 9 priority rules. See Sections 9-317(a), 9-327, 9-340, 9-341. Similarly, a corporate merger normally would not result in a transfer of funds from a deposit account. Rather, it might result in a transfer of the deposit account itself. If so, the normal rules applicable to transferred collateral would apply; this section would not.

3. Policy. Broad protection for transferees helps to ensure that security interests in deposit accounts do not impair the free flow of funds. It also minimizes the likelihood that a secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules concerning recovery of payments traditionally have placed a high value on finality. The opportunity to upset a completed transaction, or even to place a completed transaction in jeopardy by bringing suit against the transferee of funds, should be severely limited. Although the giving of value usually is a prerequisite for receiving the ability to take free from third-party claims, where payments are concerned the law is even more protective. Thus, Section 3-418(c) provides that, even where the law of restitution otherwise would permit recovery of funds paid by mistake, no recovery may be had from a person “who in good faith changed position in reliance on the payment.” Rather than adopt this standard,

this section eliminates all reliance requirements whatsoever. Payments made by mistake are relatively rare, but payments of funds from encumbered deposit accounts (e.g., deposit accounts containing collections from accounts receivable) occur with great regularity. In most cases, unlike payment by mistake, no one would object to these payments. In the vast proportion of cases, the transferee probably would be able to show a change of position in reliance on the payment. This section does not put the transferee to the burden of having to make this proof.

4. **“Bad Actors.”** To deal with the question of the “bad actor,” this section borrows “collusion” language from Article 8. See, e.g., Sections 8-115, 8-503(e). This is the most protective (i.e., least stringent) of the various standards now found in the UCC. Compare, e.g., Section 1-201(b)(9) (“without knowledge that the sale violates the rights of another person”); Section 1-201(b)(20) (“honesty in fact and the observance of reasonable com-

mercial standards of fair dealing”); Section 3-302(a)(2)(v) (“without notice of any claim”).

5. **Transferee Who Does Not Take Free.** This section sets forth the circumstances under which certain transferees of money or funds take free of security interests. It does not determine the rights of a transferee who does not take free of a security interest.

Example 3: The facts are as in Example 2, but, in wrongfully moving the funds from the deposit account at Bank A to Debtor’s deposit account with Bank B, Debtor acts in collusion with Bank B. Bank B does not take the funds free of Lender’s security interest under this section. If Debtor grants a security interest to Bank B, Section 9-327 governs the relative priorities of Lender and Bank B. Under Section 9-327(3), Bank B’s security interest in the Bank B deposit account is senior to Lender’s security interest in the deposit account as proceeds. However, Bank B’s senior security interest does not protect Bank B against any liability to Lender that might arise from Bank B’s wrongful conduct.

28-9-333. Priority of certain liens arising by operation of law. —

(a) In this section, “possessory lien” means an interest, other than a security interest or an agricultural lien:

- (1) Which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person’s business;
- (2) Which is created by statute or rule of law in favor of the person; and
- (3) Whose effectiveness depends on the person’s possession of the goods.

(b) A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.

History.

I.C., § 28-9-333, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

Warehouseman’s Liens.

Warehouseman’s lien on seed was not effective against equipment manufacturer’s security interest in seed, since its security interest in the seed was perfected before the seed was

delivered to the warehouseman; therefore, the manufacturer’s security interest had priority. *Curry Grain Storage, Inc. v. Hesston Corp.*, 120 Idaho 328, 815 P.2d 1068 (1991).

OFFICIAL COMMENT

1. **Source.** Former Section 9-310.

2. **“Possessory Liens.”** This section gov-

erns the relative priority of security interests arising under this Article and “possessory

liens," i.e., common-law and statutory liens whose effectiveness depends on the lienor's possession of goods with respect to which the lienor provided services or furnished materials in the ordinary course of its business. As under former Section 9-310, the possessory lien has priority over a security interest unless the possessory lien is created by a statute

that expressly provides otherwise. If the statute creating the possessory lien is silent as to its priority relative to a security interest, this section provides a rule of interpretation that the possessory lien takes priority, even if the statute has been construed judicially to make the possessory lien subordinate.

28-9-334. Priority of security interests in fixtures and crops. —

(a) A security interest under this chapter may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this chapter in ordinary building materials incorporated into an improvement on land.

(b) This chapter does not prevent creation of an encumbrance upon fixtures under real property law.

(c) In cases not governed by subsections (d) through (h) of this section, a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

(d) Except as otherwise provided in subsection (h) of this section, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

- (1) The security interest is a purchase-money security interest;
- (2) The interest of the encumbrancer or owner arises before the goods become fixtures; and
- (3) The security interest is perfected by a fixture filing before the goods become fixtures or within twenty (20) days thereafter.

(e) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

- (1) The debtor has an interest of record in the real property or is in possession of the real property and the security interest:
 - (A) is perfected by a fixture filing before the interest of the encumbrancer or owner is of record; and
 - (B) has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

- (2) Before the goods become fixtures, the security interest is perfected by any method permitted by this chapter and the fixtures are readily removable:

- (A) factory or office machines;
 - (B) equipment that is not primarily used or leased for use in the operation of the real property; or
 - (C) replacements of domestic appliances that are consumer goods;
- (3) The conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this chapter; or
- (4) The security interest is:

- (A) created in a manufactured home in a manufactured home transaction; and
 - (B) perfected pursuant to a statute described in section 28-9-311(a)(2)[, Idaho Code].

(f) A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

(2) The debtor has a right to remove the goods as against the encumbrancer or owner.

(g) The priority of the security interest under subsection (f)(2) of this section continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.

(h) A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if a recorded record of the mortgage so indicates. Except as otherwise provided in subsections (e) and (f) of this section, a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.

(i) A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property.

History.

I.C., § 28-9-334, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in paragraph (e)(4)(B) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Absence of knowledge.

Deed of trust.

Personalty.

Purchase at foreclosure sale.

Subsequent purchaser.

Absence of Knowledge.

An examination of the priority and foreclosure scheme of article 9 demonstrates that absence of knowledge of subordinate security interests could not be a prerequisite for a purchaser to buy property free of encum-

brances at a foreclosure sale; for, if absence of knowledge were required, the party whose interest would be undermined would be the secured party who was conducting the sale. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

Deed of Trust.

Where the small business administration held a security interest in fruit packing machinery under its real estate deed of trust which covered the real property to which the machinery was affixed, and where the SBA had purchased the entire interest of the original mortgagees of the property without knowledge of a purchase money security interest retained by the seller of the machinery, the SBA's interest was prior to the purchase money security interest. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

Personalty.

Where an irrigation pump could be removed from a concrete foundation by loosening the bolts and removing its coupling with an irrigation line, and where "lateral" irrigation lines were above-ground and could be removed from the property by uncoupling them from the subsurface lines which supplied water to them, the district court could conclude that these pieces of equipment were not fixtures attached to the realty and had retained their character as personalty. *Duff v. Draper*, 98 Idaho 379, 565 P.2d 572 (1977).

Purchase at Foreclosure Sale.

Although the seller of various items of fruit

packing machinery had retained a security interest to secure the purchase price, a subsequent foreclosure sale of the real property to which the machinery was affixed discharged the security interest held by the seller of the machinery, where the purchase at the foreclosure sale of the real estate and fruit packing machinery was in good faith. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

Subsequent Purchaser.

In a suit brought by seller of fruit packing equipment alleging a priority interest in machinery affixed to real property which was the subject of a mortgage foreclosure, where the subsequent purchaser at the foreclosure sale had agreed to pay rent for use of the machinery before default on the mortgage, and where the record title holder of the property had contracted for and consented to the machinery being affixed to the real estate, the subsequent purchaser did not have priority either as subsequent purchaser for value without knowledge or as successor in interest to record owner who had withheld consent to preservation of a security interest. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 543 F.2d 65 (9th Cir. 1976).

OFFICIAL COMMENT

1. **Source.** Former Section 9-313.

2. **Scope of This Section.** This section contains rules governing the priority of security interests in fixtures and crops as against persons who claim an interest in real property. Priority contests with other Article 9 security interests are governed by the other priority rules of this Article. The provisions with respect to fixtures follow those of former Section 9-313. However, they have been rewritten to conform to Section 2A-309 and to prevailing style conventions. Subsections (i) and (j), which apply to crops, are new.

3. **Security Interests in Fixtures.** Certain goods that are the subject of personal-property (chattel) financing become so affixed or otherwise so related to real property that they become part of the real property. These goods are called "fixtures." See Section 9-102 (definition of "fixtures"). Some fixtures retain their personal-property nature: a security interest under this Article may be created in fixtures and may continue in goods that become fixtures. See subsection (a). However, if the goods are ordinary building materials incorporated into an improvement on land, no security interest in them exists. Rather, the priority of claims to the building materials are determined by the law governing claims to real property. (Of course, the fact that no security interest exists in ordinary building

materials incorporated into an improvement on land does not prejudice any rights the secured party may have against the debtor or any other person who violated the secured party's rights by wrongfully incorporating the goods into real property.)

Thus, this section recognizes three categories of goods: (1) those that retain their chattel character entirely and are not part of the real property; (2) ordinary building materials that have become an integral part of the real property and cannot retain their chattel character for purposes of finance; and (3) an intermediate class that has become real property for certain purposes, but as to which chattel financing may be preserved.

To achieve priority under certain provisions of this section, a security interest must be perfected by making a "fixture filing" (defined in Section 9-102) in the real-property records. Because the question whether goods have become fixtures often is a difficult one under applicable real-property law, a secured party may make a fixture filing as a precaution. Courts should not infer from a fixture filing that the secured party concedes that the goods are or will become fixtures.

4. **Priority in Fixtures: General.** In considering priority problems under this section, one must first determine whether real-property claimants per se have an interest in the

crops or fixtures as part of real property. If not, it is immaterial, so far as concerns real property parties as such, whether a security interest arising under this Article is perfected or unperfected. In no event does a real-property claimant (e.g., owner or mortgagee) acquire an interest in a "pure" chattel just because a security interest therein is unperfected. If on the other hand real-property law gives real-property parties an interest in the goods, a conflict arises and this section states the priorities.

5. Priority in Fixtures: Residual Rule. Subsection (c) states the residual priority rule, which applies only if one of the other rules does not: A security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

6. Priority in Fixtures: First to File or Record. Subsection (e)(1), which follows former Section 9-313(4)(b), contains the usual priority rule of conveyancing, that is, the first to file or record prevails. In order to achieve priority under this rule, however, the security interest must be perfected by a "fixture filing" (defined in Section 9-102), i.e., a filing for record in the real property records and indexed therein, so that it will be found in a real-property search. The condition in subsection (e)(1)(B), that the security interest must have had priority over any conflicting interest of a predecessor in title of the conflicting encumbrancer or owner, appears to limit to the first-in-time principle. However, this apparent limitation is nothing other than an expression of the usual rule that a person must be entitled to transfer what he has. Thus, if the fixture security interest is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage, even though the assignment is a later recorded instrument. Similarly if the fixture security interest is subordinate to the rights of an owner, it is subordinate to a subsequent grantee of the owner and likewise subordinate to a subsequent mortgagee of the owner.

7. Priority in Fixtures: Purchase-Money Security Interests. Subsection (d), which follows former Section 9-313(4)(a), contains the principal exception to the first-to-file-or-record rule of subsection (e)(1). It affords priority to purchase-money security interests in fixtures as against prior recorded real-property interests, provided that the purchase-money security interest is filed as a fixture filing in the real-property records before the goods become fixtures or within 20 days thereafter. This priority corresponds to the purchase-money priority under Section 9-324(a). (Like other 10-day periods in former Article 9, the 10-day period in this section has been changed to 20 days.)

It should be emphasized that this purchase-money priority with the 20-day grace period for filing is limited to rights against real-property interests that arise before the goods become fixtures. There is no such priority with the 20-day grace period as against real-property interests that arise subsequently. The fixture security interest can defeat subsequent real-property interests only if it is filed first and prevails under the usual conveyancing rule in subsection (e)(1) or one of the other rules in this section.

8. Priority in Fixtures: Readily Removable Goods. Subsection (e)(2), which derives from Section 2A-309 and former Section 9-313(4)(d), contains another exception to the usual first-to-file-or-perfect rule. It affords priority to the holders of security interests in certain types of readily removable goods—factory and office machines, equipment that is not primarily used or leased for use in the operation of the real property, and (as discussed below) certain replacements of domestic appliances. This rule is made necessary by the confusion in the law as to whether certain machinery, equipment, and appliances become fixtures. It protects a secured party who, perhaps in the mistaken belief that the readily removable goods will not become fixtures, makes a UCC filing (or otherwise perfects under this Article) rather than making a fixture filing.

Frequently, under applicable law, goods of the type described in subsection (e)(2) will not be considered to have become part of the real property. In those cases, the fixture security interest does not conflict with a real-property interest, and resort to this section is unnecessary. However, if the goods have become part of the real property, subsection (e)(2) enables a fixture secured party to take priority over a conflicting real-property interest if the fixture security interest is perfected by a fixture filing or by any other method permitted by this Article. If perfection is by fixture filing, the fixture security interest would have priority over subsequently recorded real-property interests under subsection (e)(1) and, if the fixture security interest is a purchase-money security interest (a likely scenario), it would also have priority over most real-property interests under the purchase-money priority of subsection (d). Note, however, that unlike the purchase-money priority rule in subsection (d), the priority rules in subsection (e) override the priority given to a construction mortgage under subsection (h).

The rule in subsection (e)(2) is limited to readily removable replacements of domestic appliances. It does not apply to original installations. Moreover, it is limited to appliances that are "consumer goods" (defined in Section 9-102) in the hands of the debtor. The principal effect of the rule is to make clear

that a secured party financing occasional replacements of domestic appliances in noncommercial, owner-occupied contexts need not concern itself with real-property descriptions or records; indeed, for a purchase-money replacement of consumer goods, perfection without any filing will be possible. See Section 9-309(1).

9. Priority in Fixtures: Judicial Liens. Subsection (e)(3), which follows former Section 9-313(4)(d), adopts a first-in-time rule applicable to conflicts between a fixture security interest and a lien on the real property obtained by legal or equitable proceedings. Such a lien is subordinate to an earlier-perfected security interest, regardless of the method by which the security interest was perfected. Judgment creditors generally are not reliance creditors who search real-property records. Accordingly, a perfected fixture security interest takes priority over a subsequent judgment lien or other lien obtained by legal or equitable proceedings, even if no evidence of the security interest appears in the relevant real-property records. Subsection (e)(3) thus protects a perfected fixture security interest from avoidance by a trustee in bankruptcy under Bankruptcy Code Section 544(a), regardless of the method of perfection.

10. Priority in Fixtures: Manufactured Homes. A manufactured home may become a fixture. New subsection (e)(4) contains a special rule granting priority to certain security interests created in a “manufactured home” as part of a “manufactured-home transaction” (both defined in Section 9-102). Under this rule, a security interest in a manufactured home that becomes a fixture has priority over a conflicting interest of an encumbrancer or owner of the real property if the security interest is perfected under a certificate-of-title statute (see Section 9-311). Subsection (e)(4) is only one of the priority rules applicable to security interests in a manufactured home that becomes a fixture. Thus, a security interest in a manufactured home which does not qualify for priority under this subsection may qualify under another.

11. Priority in Fixtures: Construction Mortgages. The purchase-money priority presents a difficult problem in relation to

construction mortgages. The latter ordinarily will have been recorded even before the commencement of delivery of materials to the job, and therefore would take priority over fixture security interests were it not for the purchase-money priority. However, having recorded first, the holder of a construction mortgage reasonably expects to have first priority in the improvement built using the mortgagee's advances. Subsection (g) expressly gives priority to the construction mortgage recorded before the filing of the purchase-money security interest in fixtures. A refinancing of a construction mortgage has the same priority as the construction mortgage itself. The phrase “an obligation incurred for the construction of an improvement” covers both optional advances and advances pursuant to commitment. Both types of advances have the same priority under subsection (g).

The priority under this subsection applies only to goods that become fixtures during the construction period leading to the completion of the improvement. The construction priority will not apply to additions to the building made long after completion of the improvement, even if the additions are financed by the real-property mortgagee under an open-end clause of the construction mortgage. In such case, subsections (d), (e), and (f) govern.

Although this subsection affords a construction mortgage priority over a purchase-money security interest that otherwise would have priority under subsection (d), the subsection is subject to the priority rules in subsections (e) and (f). Thus, a construction mortgage may be junior to a fixture security interest perfected by a fixture filing before the construction mortgage was recorded. See subsection (e)(1).

12. Crops. Growing crops are “goods” in which a security interest may be created and perfected under this Article. In some jurisdictions, a mortgage of real property may cover crops, as well. In the event that crops are encumbered by both a mortgage and an Article 9 security interest, subsection (i) provides that the security interest has priority. States whose real-property law provides otherwise should either amend that law directly or override it by enacting subsection (j).

28-9-335. Accessions. — (a) A security interest may be created in an accession and continues in collateral that becomes an accession.

(b) If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral.

(c) Except as otherwise provided in subsections (d) and (g) of this section, the other provisions of this part determine the priority of a security interest in an accession.

(d) Except as otherwise provided in subsection (g) of this section, a security interest in an accession is subordinate to a security interest in the

whole which is perfected by compliance with the requirements of a certificate of title statute under section 28-9-311(b)[, Idaho Code].

(e) After default, subject to part 6[, chapter 9, title 28, Idaho Code], a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole.

(f) A secured party that removes an accession from other goods under subsection (e) of this section shall promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

(g) A security interest in an accession has priority over a security interest in the whole which is perfected by compliance with the requirements of a certificate-of-title statute under subsection (b) of section 28-9-311, Idaho Code, if the security interest in the accession is a purchase money security interest that is perfected when the debtor receives possession of the accession or within twenty (20) days thereafter.

History.

I.C., § 28-9-335, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions in subsections (d) and (e) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS**DECISIONS UNDER PRIOR LAW****ANALYSIS**

Absence of knowledge.

Deed to real property.

Purchase at foreclosure sale.

Absence of Knowledge.

An examination of the priority and foreclosure scheme of article 9 demonstrates that absence of knowledge of subordinate security interests could not be a prerequisite for a purchaser to buy property free of encumbrances at a foreclosure sale; for, if absence of knowledge were required, the party whose interest would be undermined would be the secured party who was conducting the sale.

Northwest Equip. Sales Co. v. Western Packers, Inc., 623 F.2d 92 (9th Cir. 1980).

Deed to Real Property.

Where the small business administration held a security interest in fruit packing machinery under its real estate deed of trust which covered the real property to which the machinery was affixed, and where the SBA had purchased the entire interest of the orig-

inal mortgagees of the property without knowledge of a purchase money security interest retained by the seller of the machinery, the SBA's interest was prior to the purchase money security interest. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

Purchase at Foreclosure Sale.

Although the seller of various items of fruit

packing machinery had retained a security interest to secure the purchase price, a subsequent foreclosure sale of the real property to which the machinery was affixed discharged the security interest held by the seller of the machinery, where the purchase at the foreclosure sale of the real estate and fruit packing machinery was in good faith. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

OFFICIAL COMMENT

1. **Source.** Former Section 9-314.

2. **"Accession."** This section applies to an "accession," as defined in Section 9-102, regardless of the cost or difficulty of removing the accession from the other goods, and regardless of whether the original goods have come to form an integral part of the other goods. This section does not apply to goods whose identity has been lost. Goods of that kind are "commingled goods" governed by Section 9-336. Neither this section nor the following one addresses the case of collateral that changes form without the addition of other goods.

3. **"Accession" vs. "Other Goods."** This section distinguishes among the "accession," the "other goods," and the "whole." The last term refers to the combination of the "accession" and the "other goods." If one person's collateral becomes physically united with another person's collateral, each is an "accession."

Example 1: SP-1 holds a security interest in the debtor's tractors (which are not subject to a certificate-of-title statute), and SP-2 holds a security interest in a particular tractor engine. The engine is installed in a tractor. From the perspective of SP-1, the tractor becomes an "accession" and the engine is the "other goods." From the perspective of SP-2, the engine is the "accession" and the tractor is the "other goods." The completed tractor-tractor cum engine-constitutes the "whole."

4. **Scope.** This section governs only a few issues concerning accessions. Subsection (a) contains rules governing continuation of a security interest in an accession. Subsection (b) contains a rule governing continued perfection of a security interest in goods that become an accession. Subsection (d) contains a special priority rule governing accessions that become part of a whole covered by a certificate of title. Subsections (e) and (f) govern enforcement of a security interest in an accession.

5. **Matters Left to Other Provisions of This Article: Attachment and Perfection.** Other provisions of this Article often govern accession-related issues. For example, this section does not address whether a secured

party acquires a security interest in the whole if its collateral becomes an accession. Normally this will turn on the description of the collateral in the security agreement.

Example 2: Debtor owns a computer subject to a perfected security interest in favor of SP-1. Debtor acquires memory and installs it in the computer. Whether SP-1's security interest attaches to the memory depends on whether the security agreement covers it.

Similarly, this section does not determine whether perfection against collateral that becomes an accession is effective to perfect a security interest in the whole. Other provisions of this Article, including the requirements for indicating the collateral covered by a financing statement, resolve that question.

6. **Matters Left to Other Provisions of This Article: Priority.** With one exception, concerning goods covered by a certificate of title (see subsection (d)), the other provisions of this Part, including the rules governing purchase-money security interests, determine the priority of most security interests in an accession, including the relative priority of a security interest in an accession and a security interest in the whole. See subsection (c).

Example 3: Debtor owns an office computer subject to a security interest in favor of SP-1. Debtor acquires memory and grants a perfected security interest in the memory to SP-2. Debtor installs the memory in the computer, at which time (one assumes) SP-1's security interest attaches to the memory. The first-to-file-or-perfect rule of Section 9-322 governs priority in the memory. If, however, SP-2's security interest is a purchase-money security interest, Section 9-324(a) would afford priority in the memory to SP-2, regardless of which security interest was perfected first.

7. **Goods Covered by Certificate of Title.** This section does govern the priority of a security interest in an accession that is or becomes part of a whole that is subject to a security interest perfected by compliance with a certificate-of-title statute. Subsection (d) provides that a security interest in the whole, perfected by compliance with a certificate-of-

title statute, takes priority over a security interest in the accession. It enables a secured party to rely upon a certificate of title without having to check the UCC files to determine whether any components of the collateral may be encumbered. The subsection imposes a corresponding risk upon those who finance goods that may become part of goods covered by a certificate of title. In doing so, it reverses the priority that appeared reasonable to most pre-UCC courts.

Example 4: Debtor owns an automobile

subject to a security interest in favor of SP-1. The security interest is perfected by notation on the certificate of title. Debtor buys tires subject to a perfected-by-filing purchase-money security interest in favor of SP-2 and mounts the tires on the automobile's wheels. If the security interest in the automobile attaches to the tires, then SP-1 acquires priority over SP-2. The same result would obtain if SP-1's security interest attached to the automobile and was perfected after the tires had been mounted on the wheels.

28-9-336. Commingled goods. — (a) In this section, “commingled goods” means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass.

(b) A security interest does not exist in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods.

(c) If collateral becomes commingled goods, a security interest attaches to the product or mass.

(d) If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under subsection (c) of this section is perfected.

(e) Except as otherwise provided in subsection (f) of this section, the other provisions of this part determine the priority of a security interest that attaches to the product or mass under subsection (c) of this section.

(f) If more than one (1) security interest attaches to the product or mass under subsection (c) of this section, the following rules determine priority:

(1) A security interest that is perfected under subsection (d) of this section has priority over a security interest that is unperfected at the time the collateral becomes commingled goods.

(2) If more than one (1) security interest is perfected under subsection (d) of this section, the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods.

History.

I.C., § 28-9-336, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after
July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-315.

2. **“Commingled Goods.”** Subsection (a) defines “commingled goods.” It is meant to include not only goods whose identity is lost through manufacturing or production (e.g., flour that has become part of baked goods) but also goods whose identity is lost by commin-

gling with other goods from which they cannot be distinguished (e.g., ball bearings).

3. **Consequences of Becoming “Commingled Goods.”** By definition, the identity of the original collateral cannot be determined once the original collateral becomes commingled goods. Consequently, the security

interest in the specific original collateral alone is lost once the collateral becomes commingled goods, and no security interest in the original collateral can be created thereafter except as a part of the resulting product or mass. See subsection (b).

Once collateral becomes commingled goods, the secured party's security interest is transferred from the original collateral to the product or mass. See subsection (c). If the security interest in the original collateral was perfected, the security interest in the product or mass is a perfected security interest. See subsection (d). This perfection continues until lapse.

4. Priority of Perfected Security Interests That Attach Under This Section. This section governs the priority of competing security interests in a product or mass only when both security interests arise under this section. In that case, if both security interests are perfected by operation of this section (see subsections (c) and (d)), then the security interests rank equally, in proportion to the value of the collateral at the time it became commingled goods. See subsection (f)(2).

Example 1: SP-1 has a perfected security interest in Debtor's eggs, which have a value of \$300 and secure a debt of \$400, and SP-2 has a perfected security interest in Debtor's flour, which has a value of \$500 and secures a debt of \$700. Debtor uses the flour and eggs to make cakes, which have a value of \$1000. The two security interests rank equally and share in the ratio of 3:5. Applying this ratio to the entire value of the product, SP-1 would be entitled to \$375 (i.e., $\frac{3}{8} \times \$1000$), and SP-2 would be entitled to \$625 (i.e., $\frac{5}{8} \times \$1000$).

Example 2: Assume the facts of Example 1, except that SP-1's collateral, worth \$300, secures a debt of \$200. Recall that, if the cake is worth \$1000, then applying the ratio of 3:5 would entitle SP-1 to \$375 and SP-2 to \$625. However, SP-1 is not entitled to collect from the product more than it is owed. Accordingly, SP-1's share would be only \$200, SP-2 would receive the remaining value, up to the amount it is owed (\$700).

Example 3: Assume that the cakes in the previous examples have a value of only \$600. Again, the parties share in the ratio of 3:5. If, as in Example 1, SP-1 is owed \$400, then SP-1 is entitled to \$225 (i.e., $\frac{3}{8} \times \$600$), and SP-2 is entitled to \$375 (i.e., $\frac{5}{8} \times \$600$). Debtor receives nothing. If, however, as in Example 2, SP-1 is owed only \$200, then SP-2 receives \$400.

The results in the foregoing examples remain the same, regardless of whether SP-1 or SP-2 (or each) has a purchase-money security interest.

5. Perfection: Unperfected Security Interests. The rule explained in the preceding Comment applies only when both security

interests in original collateral are perfected when the goods become commingled goods. If a security interest in original collateral is unperfected at the time the collateral becomes commingled goods, subsection (f)(1) applies.

Example 4: SP-1 has a perfected security interest in the debtor's eggs, and SP-2 has an unperfected security interest in the debtor's flour. Debtor uses the flour and eggs to make cakes. Under subsection (c), both security interests attach to the cakes. But since SP-1's security interest was perfected at the time of commingling and SP-2's was not, only SP-1's security interest in the cakes is perfected. See subsection (d). Under subsection (f)(1) and Section 9-322(a)(2), SP-1's perfected security interest has priority over SP-2's unperfected security interest.

If both security interests are unperfected, the rule of Section 9-322(a)(3) would apply.

6. Multiple Security Interests. On occasion, a single input may be encumbered by more than one security interest. In those cases, the multiple secured parties should be treated like a single secured party for purposes of determining their collective share under subsection (f)(2). The normal priority rules would determine how that share would be allocated between them. Consider the following example, which is a variation on Example 1 above:

Example 5: SP-1A has a perfected, first-priority security interest in Debtor's eggs. SP-1B has a perfected, second-priority security interest in the same collateral. The eggs have a value of \$300. Debtor owes \$200 to SP-1A and \$200 to SP-1B. SP-2 has a perfected security interest in Debtor's flour, which has a value of \$500 and secures a debt of \$600. Debtor uses the flour and eggs to make cakes, which have a value of \$1000.

For purposes of subsection (f)(2), SP-1A and SP-1B should be treated like a single secured party. The collective security interest would rank equally with that of SP-2. Thus, the secured parties would share in the ratio of 3 (for SP-1A and SP-1B combined) to 5 (for SP-2). Applying this ratio to the entire value of the product, SP-1A and SP-1B in the aggregate would be entitled to \$375 (i.e., $\frac{3}{8} \times \$1000$), and SP-2 would be entitled to \$625 (i.e., $\frac{5}{8} \times \$1000$).

SP-1A and SP-1B would share the \$375 in accordance with their priority, as established under other rules. Inasmuch as SP-1A has first priority, it would receive \$200, and SP-1B would receive \$175.

7. Priority of Security Interests That Attach Other Than by Operation of This Section. Under subsection (e), the normal priority rules determine the priority of a security interest that attaches to the product or mass other than by operation of this section.

For example, assume that SP-1 has a perfected security interest in Debtor's existing and after-acquired baked goods, and SP-2 has a perfected security interest in Debtor's flour. When the flour is processed into cakes, subsections (c) and (d) provide that SP-2 acquires a perfected security interest in the cakes. If

SP-1 filed against the baked goods before SP-2 filed against the flour, then SP-1 will enjoy priority in the cakes. See Section 9-322 (first-to-file-or-perfect). But if SP-2 filed against the flour before SP-1 filed against the baked goods, then SP-2 will enjoy priority in the cakes to the extent of its security interest.

28-9-337. Priority of security interests in goods covered by certificate of title. — If, while a security interest in goods is perfected by any method under the law of another jurisdiction, this state issues a certificate of title that does not show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate:

(1) A buyer of the goods, other than a person in the business of selling goods of that kind, takes free of the security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest; and

(2) The security interest is subordinate to a conflicting security interest in the goods that attaches, and is perfected under section 28-9-311(b)[, Idaho Code], after issuance of the certificate and without the conflicting secured party's knowledge of the security interest.

History.

I.C., § 28-9-337, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (2) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Derived from former Section 9-103(2)(d).

2. **Protection for Buyers and Secured Parties.** This section affords protection to certain good-faith purchasers for value who are likely to have relied on a "clean" certificate of title, i.e., one that neither shows that the goods are subject to a particular security interest nor contains a statement that they may be subject to security interests not shown

on the certificate. Under this section, a buyer can take free of, and the holder of a conflicting security interest can acquire priority over, a security interest that is perfected by any method under the law of another jurisdiction. The fact that the security interest has been reperfected by possession under Section 9-313 does not of itself disqualify the holder of a conflicting security interest from protection under paragraph (2).

28-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information. — If a security interest or agricultural lien is perfected by a filed financing statement providing information described in section 28-9-516(b)(5)[, Idaho Code,] which is incorrect at the time the financing statement is filed:

(1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of

the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of tangible chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral.

History.

I.C., § 28-9-338, as added by 2001, ch. 208, § 2, p. 704; am. 2004, ch. 42, § 31, p. 77.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in the introductory paragraph was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. Effect of Incorrect Information in Financing Statement. Section 9-520(a) requires the filing office to reject financing statements that do not contain information concerning the debtor as specified in Section 9-516(b)(5). An error in this information does not render the financing statement ineffective. On rare occasions, a subsequent purchaser of the collateral (i.e., a buyer or secured party) may rely on the misinformation to its detriment. This section subordinates a security interest or agricultural lien perfected by an effective, but flawed, financing statement to the rights of a buyer or holder of a perfected security interest to the extent that, in reasonable reliance on the incorrect information, the purchaser gives value and, in the case of tangible collateral, receives delivery of the collateral. A purchaser who has not made

itself aware of the information in the filing office with respect to the debtor cannot act in "reasonable reliance" upon incorrect information.

3. Relationship to Section 9-507. This section applies to financing statements that contain information that is incorrect at the time of filing and imposes a small risk of subordination on the filer. In contrast, Section 9-507 deals with financing statements containing information that is correct at the time of filing but which becomes incorrect later. Except as provided in Section 9-507 with respect to changes in the name that is sufficient as the name of the debtor under Section 9-503(a), an otherwise effective financing statement does not become ineffective if the information contained in it becomes inaccurate.

28-9-339. Priority subject to subordination. — This article does not preclude subordination by agreement by a person entitled to priority.

History.

I.C., § 28-9-339, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. Former Section 9-316.

2. Subordination by Agreement. The

preceding sections deal elaborately with questions of priority. This section makes it entirely

clear that a person entitled to priority may effectively agree to subordinate its claim. Only the person entitled to priority may make

such an agreement: a person's rights cannot be adversely affected by an agreement to which the person is not a party.

28-9-340. Effectiveness of right of recoupment or set-off against deposit account. — (a) Except as otherwise provided in subsection (c) of this section, a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account.

(b) Except as otherwise provided in subsection (c) of this section, the application of this chapter to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured party.

(c) The exercise by a bank of a set-off against a deposit account is ineffective against a secured party that holds a security interest in the deposit account which is perfected by control under section 28-9-104(a)(3)[, Idaho Code], if the set-off is based on a claim against the debtor.

History.

I.C., § 28-9-340, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (c) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New; subsection (b) is based on a nonuniform Illinois amendment.

2. **Set-off vs. Security Interest.** This section resolves the conflict between a security interest in a deposit account and the bank's rights of recoupment and set-off.

Subsection (a) states the general rule and provides that the bank may effectively exercise rights of recoupment and set-off against the secured party. Subsection (c) contains an exception: if the secured party has control under Section 9-104(a)(3) (i.e., if it has become the bank's customer), then any set-off exercised by the bank against a debt owed by the debtor (as opposed to a debt owed to the bank by the secured party) is ineffective. The bank may, however, exercise its recoupment rights effectively. This result is consistent with the priority rule in Section 9-327(4), under which the security interest of a bank in

a deposit account is subordinate to that of a secured party who has control under Section 9-104(a)(3).

This section deals with rights of set-off and recoupment that a bank may have under other law. It does not create a right of set-off or recoupment, nor is it intended to override any limitations or restrictions that other law imposes on the exercise of those rights.

3. **Preservation of Set-Off Right.** Subsection (b) makes clear that a bank may hold both a right of set-off against, and an Article 9 security interest in, the same deposit account. By holding a security interest in a deposit account, a bank does not impair any right of set-off it would otherwise enjoy. This subsection does not pertain to accounts evidenced by an instrument (e.g., certain certificates of deposit), which are excluded from the definition of "deposit accounts."

28-9-341. Bank's rights and duties with respect to deposit account. — Except as otherwise provided in section 28-9-340(c)[, Idaho Code], and unless the bank otherwise agrees in an authenticated record, a bank's

rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended or modified by:

(1) The creation, attachment or perfection of a security interest in the deposit account;

(2) The bank's knowledge of the security interest; or

(3) The bank's receipt of instructions from the secured party.

History.

I.C., § 28-9-341, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in the introductory paragraph was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. **Free Flow of Funds.** This section is designed to prevent security interests in deposit accounts from impeding the free flow of funds through the payment system. Subject to two exceptions, it leaves the bank's rights and duties with respect to the deposit account and the funds on deposit unaffected by the creation or perfection of a security interest or by the bank's knowledge of the security interest. In addition, the section permits the bank to ignore the instructions of the secured party unless it had agreed to honor them or unless other law provides to the contrary. A secured party who wishes to deprive the debtor of access to funds on deposit or to appropriate those funds for itself needs to obtain the agreement of the bank, utilize the judicial process, or comply with procedures set forth in other law. Section 4-303(a), concerning the effect of notice on a bank's right and duty to pay items, is not to the contrary. That section addresses only whether an otherwise effective notice comes too late; it does not determine whether a timely notice is otherwise effective.

3. **Operation of Rule.** The general rule of this section is subject to Section 9-340(c), under which a bank's right of set-off may not be exercised against a deposit account in the secured party's name if the right is based on a

claim against the debtor. This result reflects current law in many jurisdictions and does not appear to have unduly disrupted banking practices or the payments system. The more important function of this section, which is not impaired by Section 9-340, is the bank's right to follow the debtor's (customer's) instructions (e.g., by honoring checks, permitting withdrawals, etc.) until such time as the depository institution is served with judicial process or receives instructions with respect to the funds on deposit from a secured party who has control over the deposit account.

4. **Liability of Bank.** This Article does not determine whether a bank that pays out funds from an encumbered deposit is liable to the holder of a security interest. Although the fact that a secured party has control over the deposit account and the manner by which control was achieved may be relevant to the imposition of liability, whatever rule applies generally when a bank pays out funds in which a third party has an interest would determine liability to a secured party. Often, this rule is found in a non-UCC adverse claim statute.

5. **Certificates of Deposit.** This section does not address the obligations of banks that issue instruments evidencing deposits (e.g., certain certificates of deposit).

28-9-342. Bank's right to refuse to enter into or disclose existence of control agreement. — This chapter does not require a bank to enter into an agreement of the kind described in section 28-9-104(a)(2)[, Idaho Code], even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer.

History.

I.C., § 28-9-342, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertion in the first sentence was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New; derived from Section 8-106(g).

2. **Protection for Bank.** This section protects banks from the need to enter into agree-

ments against their will and from the need to respond to inquiries from persons other than their customers.

PART 4. RIGHTS OF THIRD PARTIES

28-9-401. Alienability of debtor's rights. — (a) Except as otherwise provided in subsection (b) of this section and sections 28-9-406, 28-9-407, 28-9-408 and 28-9-409[, Idaho Code], whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this chapter.

(b) An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect.

History.

I.C., § 28-9-401, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Prior Laws.**

Former § 28-9-401, which comprised 1967, ch. 161, § 9-401, p. 351; am. 1979, ch. 299, § 28, p. 781; am. 1986, ch. 338, § 2, p. 834, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertion in subsection (a) was added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS**DECISIONS UNDER PRIOR LAW****ANALYSIS**

Effect of payment by creditor.
Instruction to jury.
Rents not impressed with lien.

Effect of Payment by Creditor.

Where creditor, in order to subject mortgaged property of his debtor to the payment of his claim, paid amount of mortgage to mortgagee, mortgage was discharged and creditor could not thereafter enforce the same.

Baumgartner v. Vollmer, 5 Idaho 340, 49 P. 729 (1897).

Instruction to Jury.

Instruction that sheriff was not liable for damages for acts of keeper whose appoint-

ment was requested by plaintiff was harmless error. *Applebaum v. Stanton*, 47 Idaho 395, 276 P. 47 (1929).

Rents Not Impressed With Lien.

Where a creditor held notes of the lessor, and the lease had been filed as a chattel

mortgage, he acquired no rights in and to rent money due under the lease by service of notice or attachment of the lease and filing the same of record or by serving a notice of garnishment on lessee. *Gem State Lumber Co. v. Galion Irrigated Land Co.*, 55 Idaho 314, 41 P.2d 620 (1935).

OFFICIAL COMMENT

1. **Source.** Former Section 9-311.

2. **Scope of This Part.** This Part deals with several issues affecting third parties (i.e., parties other than the debtor and the secured party). These issues are not addressed in Part 3, Subpart 3, which deals with priorities. This Part primarily addresses the rights and duties of account debtors and other persons obligated on collateral who are not, themselves, parties to a secured transaction.

3. **Governing Law.** There was some uncertainty under former Article 9 as to which jurisdiction's law (usually, which jurisdiction's version of Article 9) applied to the matters that this Part addresses. Part 3, Subpart 1, does not determine the law governing these matters because they do not relate to perfection, the effect of perfection or nonperfection, or priority. However, it might be inappropriate for a designation of applicable law by a debtor and secured party under Section 1-301 to control the law applicable to an independent transaction or relationship between the debtor and an account debtor.

Consider an example under Section 9-408.

Example 1: State X has adopted this Article; former Article 9 is the law of State Y. A general intangible (e.g., a franchise agreement) between a debtor-franchisee, D, and an account debtor-franchisor, AD, is governed by the law of State Y. D grants to SP a security interest in its rights under the franchise agreement. The franchise agreement contains a term prohibiting D's assignment of its rights under the agreement. D and SP agree that their secured transaction is governed by the law of State X. Under State X's Section 9-408, the restriction on D's assignment is ineffective to prevent the creation, attachment, or perfection of SP's security interest. State Y's former Section 9-318(4), however, does not address restrictions on the creation of security interests in general intangibles other than general intangibles for money due or to become due. Accordingly, it does not address restrictions on the assignment to SP of D's rights under the franchise agreement. The non-Article-9 law of State Y, which does address restrictions, provides that the prohibition on assignment is effective.

This Article does not provide a specific answer to the question of which State's law applies to the restriction on assignment in the

example. However, assuming that under non-UCC choice-of-law principles the effectiveness of the restriction would be governed by the law of State Y, which governs the franchise agreement, the fact that State X's Article 9 governs the secured transaction between SP and D would not override the otherwise applicable law governing the agreement. Of course, to the extent that jurisdictions eventually adopt identical versions of this Article and courts interpret it consistently, the inability to identify the applicable law in circumstances such as those in the example may be inconsequential.

4. Inalienability Under Other Law.

Subsection (a) addresses the question whether property necessarily is transferable by virtue of its inclusion (i.e., its eligibility as collateral) within the scope of Article 9. It gives a negative answer, subject to the identified exceptions. The substance of subsection (a) was implicit under former Article 9.

5. **Negative Pledge Covenant.** Subsection (b) is an exception to the general rule in subsection (a). It makes clear that in secured transactions under this Article the debtor has rights in collateral (whether legal title or equitable) which it can transfer and which its creditors can reach. It is best explained with an example.

Example 2: A debtor, D, grants to SP a security interest to secure a debt in excess of the value of the collateral. D agrees with SP that it will not create a subsequent security interest in the collateral and that any security interest purportedly granted in violation of the agreement will be void. Subsequently, in violation of its agreement with SP, D purports to grant a security interest in the same collateral to another secured party.

Subsection (b) validates D's creation of the subsequent (prohibited) security interest, which might even achieve priority over the earlier security interest. See Comment 7. However, unlike some other provisions of this Part, such as Section 9-406, subsection (b) does not provide that the agreement restricting assignment itself is "ineffective." Consequently, the debtor's breach may create a default.

6. **Rights of Lien Creditors.** Difficult problems may arise with respect to attachment, levy, and other judicial procedures un-

der which a debtor's creditors may reach collateral subject to a security interest. For example, an obligation may be secured by collateral worth many times the amount of the obligation. If a lien creditor has caused all or a portion of the collateral to be seized under judicial process, it may be difficult to determine the amount of the debtor's "equity" in the collateral that has been seized. The section leaves resolution of this problem to the courts. The doctrine of marshaling may be appropriate.

7. **Sale of Receivables.** If a debtor sells an account, chattel paper, payment intangi-

ble, or promissory note outright, as against the buyer the debtor has no remaining rights to transfer. If, however, the buyer fails to perfect its interest, then solely insofar as the rights of certain third parties are concerned, the debtor is deemed to retain its rights and title. See Section 9-318. The debtor has the power to convey these rights to a subsequent purchaser. If the subsequent purchaser (buyer or secured lender) perfects its interest, it will achieve priority over the earlier, unperfected purchaser. See Section 9-322(a)(1).

28-9-402. Secured party not obligated on contract of debtor or in tort. — The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions.

History.

I.C., § 28-9-402, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-402, which comprised 1967, ch. 161, § 9-402, p. 351; am. 1979, ch. 299, § 29, p. 781; am. 1980, ch. 156, § 1, p. 326; am. 1986, ch. 338, § 4, p. 834; am. 1987, ch.

284, § 7, p. 596; am. 1989, ch. 239, § 1, p. 583; am. 1990, ch. 421, § 1, p. 1166; am. 1991, ch. 69, § 1, p. 165; am. 1996, ch. 307, § 1, p. 1006, was repealed by S.L. 2001, ch. 208, § 1.

OFFICIAL COMMENT

1. **Source.** Former Section 9-317.

2. **Nonliability of Secured Party.** This section, like former Section 9-317, rejects theories on which a secured party might be held liable on a debtor's contracts or in tort merely

because a security interest exists or because the debtor is entitled to dispose of or use collateral. This section expands former Section 9-317 to cover agricultural liens.

28-9-403. Agreement not to assert defenses against assignee. — (a) In this section, "value" has the meaning provided in section 28-3-303(1)[, Idaho Code].

(b) Except as otherwise provided in this section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:

- (1) For value;
 - (2) In good faith;
 - (3) Without notice of a claim of a property or possessory right to the property assigned; and
 - (4) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under section 28-3-305(1)[, Idaho Code].
- (c) Subsection (b) of this section does not apply to defenses of a type that

may be asserted against a holder in due course of a negotiable instrument under section 28-3-305(2)[, Idaho Code].

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this chapter requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement:

(1) The record has the same effect as if the record included such a statement; and

(2) The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

(e) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family or household purposes.

(f) Except as otherwise provided in subsection (d) of this section, this section does not displace law other than this chapter which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee.

History.

I.C., § 28-9-403, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-403, which comprised I.C., § 28-9-403, as added by 1979, ch. 299, § 31, p. 781; am. 1980, ch. 156, § 2, p. 326; am. 1981, ch. 203, § 1, p. 364; am. 1986, ch. 338, § 5, p. 834; am. 1987, ch. 284, § 8, p. 596; am. 1990, ch. 205, § 2, p. 457; am. 1990, ch. 421, § 2, p. 1166; am. 1991, ch. 69, § 2, p. 165; am. 1991, ch. 70, § 1, p. 171; am. 1992, ch. 164,

§ 1, p. 525, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions in subsections (a) and (c) and paragraph (b)(4) were added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. **Source.** Former Section 9-206.

2. **Scope and Purpose.** Subsection (b), like former Section 9-206, generally validates an agreement between an account debtor and an assignor that the account debtor will not assert against an assignee claims and defenses that it may have against the assignor. These agreements are typical in installment sale agreements and leases. However, this section expands former Section 9-206 to apply to all account debtors; it is not limited to account debtors that have bought or leased goods. This section applies only to the obligations of an "account debtor," as defined in Section 9-102. Thus, it does not determine the circumstances under which and the extent to which a person who is obligated on a negotiable instrument is disabled from asserting

claims and defenses. Rather, Article 3 must be consulted. See, e.g., Sections 3-305, 3-306. Article 3 governs even when the negotiable instrument constitutes part of chattel paper. See Section 9-102 (an obligor on a negotiable instrument constituting part of chattel paper is not an "account debtor").

3. **Conditions of Validation; Relationship to Article 3.** Subsection (b) validates an account debtor's agreement only if the assignee takes an assignment for value, in good faith, and without notice of conflicting claims to the property assigned or of certain claims or defenses of the account debtor. Like former Section 9-206, this section is designed to put the assignee in a position that is no better and no worse than that of a holder in due course of a negotiable instrument under Article 3. How-

ever, former Section 9-206 left open certain issues, e.g., whether the section incorporated the special Article 3 definition of “value” in Section 3-303 or the generally applicable definition in Section 1-201(44) [now 1-204]. Subsection (a) addresses this question; it provides that “value” has the meaning specified in Section 3-303(a). Similarly, subsection (c) provides that subsection (b) does not validate an agreement with respect to defenses that could be asserted against a holder in due course under Section 3-305(b) (the so-called “real” defenses). In 1990, the definition of “holder in due course” (Section 3-302) and the articulation of the rights of a holder in due course (Sections 3-305 and 3-306) were revised substantially. This section tracks more closely the rules of Sections 3-302, 3-305, and 3-306.

4. Relationship to Terms of Assigned Property. Former Section 9-206(2), concerning warranties accompanying the sale of goods, has been deleted as unnecessary. This Article does not regulate the terms of the account, chattel paper, or general intangible that is assigned, except insofar as the account, chattel paper, or general intangible itself creates a security interest (as often is the case with chattel paper). Thus, Article 2, and not this Article, determines whether a seller of goods makes or effectively disclaims warranties, even if the sale is secured. Similarly, other law, and not this Article, determines the effectiveness of an account debtor’s undertaking to pay notwithstanding, and not to assert, any defenses or claims against an assignor — e.g., a “hell-or-high-water” provision in the underlying agreement that is assigned. If other law gives effect to this undertaking, then, under principles of *nemo dat*, the undertaking would be enforceable by the assignee (secured party). If other law prevents the assignor from enforcing the undertaking, this section nevertheless might permit the assignee to do so. The right of the assignee to enforce would depend upon whether, under the particular facts, the account debtor’s undertaking fairly could be construed as an agreement that falls within the scope of this section and whether the assignee meets the requirements of this section.

5. Relationship to Federal Trade Commission Rule. Subsection (d) is new. It applies to rights evidenced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. Part 433 (the “Holder-in-Due-Course Regulations”). Under this subsection, an assignee of such a record takes subject to the consumer account debtor’s claims and defenses to the same extent as it would have if the writing had contained the required notice. Thus, subsection (d) effectively renders waiver-of-defense clauses ineffective in the transactions with consumers to which it applies.

6. Relationship to Other Law. Like former Section 9-206(1), this section takes no position on the enforceability of waivers of claims and defenses by consumer account debtors, leaving that question to other law. However, the reference to “law other than this article” in subsection (e) encompasses administrative rules and regulations; the reference in former Section 9-206(1) that it replaces (“statute or decision”) arguably did not.

This section does not displace other law that gives effect to a non-consumer account debtor’s agreement not to assert defenses against an assignee, even if the agreement would not qualify under subsection (b). See subsection (f). It validates, but does not invalidate, agreements made by a non-consumer account debtor. This section also does not displace other law to the extent that the other law permits an assignee, who takes an assignment with notice of a claim of a property or possessory right, a defense, or a claim in recoupment, to enforce an account debtor’s agreement not to assert claims and defenses against the assignor (e.g., a “hell-or-high-water” agreement). See Comment 4. It also does not displace an assignee’s right to assert that an account debtor is estopped from asserting a claim or defense. Nor does this section displace other law with respect to waivers of potential future claims and defenses that are the subject of an agreement between the account debtor and the assignee. Finally, it does not displace Section 1-107, concerning waiver of a breach that allegedly already has occurred.

28-9-404. Rights acquired by assignee — Claims and defenses against assignee. — (a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e) of this section, the rights of an assignee are subject to:

- (1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and
- (2) Any other defense or claim of the account debtor against the assignor

which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) Subject to subsection (c) of this section and except as otherwise provided in subsection (d) of this section, the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) of this section only to reduce the amount the account debtor owes.

(c) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family or household purposes.

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this chapter requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) This section does not apply to an assignment of a health care insurance receivable.

History.

I.C., § 28-9-404, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-404, which comprised I.C., § 28-9-404, as added by 1979, ch. 299, § 33, p. 781; am. 1980, ch. 156, § 3, p. 326; am.

1986, ch. 338, § 6, p. 834; am. 1987, ch. 284, § 9, p. 596; am. 1992, ch. 164, § 2, p. 525, was repealed by S.L. 2001, ch. 208, § 1.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Account debtor.

Reliance on terms of assignment.

Account Debtor.

Where after-acquired collateral was not reasonably identified or described in assignment to bank of rights under contracts between grain broker and grain concern, so that the assignment created no security interest in the after-acquired collateral and did not cover future advances, and where an examination of the course of performance by the parties did not reveal legal or equitable reasons to construe the language against grain concern, the grain concern was not an account debtor with respect to the proceeds in question and could not be held liable to the bank under this section for breaching the assignment by paying the proceeds of these contracts to the broker rather than to the bank. Idaho Bank &

Trust Co. v. Cargill, Inc., 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

Reliance on Terms of Assignment.

Where nothing in assignment to bank of rights under contracts between grain broker and grain concern indicated that it covered future advances made by bank, grain concern was justified in relying on assignment language in determining whether to follow broker's request to discontinue issuing joint payment checks on subsequent contracts and grain concern's course of conduct in providing joint payment checks up until that point did not establish that assignment was intended to cover future advances nor indicate that grain dealer had notice of that fact, particu-

larly as grain concern was not a party to the assignment. Idaho Bank & Trust Co. v.

Cargill, Inc., 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

RESEARCH REFERENCES

Am. Jur. — 11 Am. Jur. 2d, Bills and Notes, § 212.

67 Am. Jur. 2d, Sales, § 347 et seq.

A.L.R. — Assignment, construction and op-

eration of UCC § 9-318(3) providing that account debtor is authorized to pay assignor until he receives notification to pay assignee. 100 A.L.R.3d 1218.

OFFICIAL COMMENT

1. **Source.** Former Section 9-318(1).

2. **Purpose; Rights of Assignee in General.** Subsection (a), like former Section 9-318(1), provides that an assignee generally takes an assignment subject to defenses and claims of an account debtor. Under subsection (a)(1), if the account debtor's defenses on an assigned claim arise from the transaction that gave rise to the contract with the assignor, it makes no difference whether the defense or claim accrues before or after the account debtor is notified of the assignment. Under subsection (a)(2), the assignee takes subject to other defenses or claims only if they accrue before the account debtor has been notified of the assignment. Of course, an account debtor may waive its right to assert defenses or claims against an assignee under Section 9-403 or other applicable law. Subsection (a) tracks Section 3-305(a)(3) more closely than its predecessor.

3. **Limitation on Affirmative Claims.** Subsection (b) is new. It limits the claim that the account debtor may assert against an assignee. Borrowing from Section 3-305(a)(3) and cases construing former Section 9-318, subsection (b) generally does not afford the account debtor the right to an affirmative recovery from an assignee.

4. **Consumer Account Debtors; Relationship to Federal Trade Commission Rule.** Subsections (c) and (d) also are new. Subsection (c) makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors. An "account debtor who is an individual" as used in subsection (c) includes individuals who are jointly or jointly and severally obligated. Subsection (d) applies to rights evi-

denced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. Part 433 (the "Holder-in-Due-Course Regulations"). Under subsection (d), a consumer account debtor has the same right to an affirmative recovery from an assignee of such a record as the consumer would have had against the assignee had the record contained the required notice.

5. **Scope; Application to "Account Debtor."** This section deals only with the rights and duties of "account debtors" and for the most part only with account debtors on accounts, chattel paper, and payment intangibles. Subsection (e) provides that the obligation of an insurer with respect to a health-care-insurance receivable is governed by other law. References in this section to an "account debtor" include account debtors on collateral that is proceeds. Neither this section nor any other provision of this Article, including Sections 9-408 and 9-409, provides analogous regulation of the rights and duties of other obligors on collateral, such as the maker of a negotiable instrument (governed by Article 3), the issuer of or nominated person under a letter of credit (governed by Article 5), or the issuer of a security (governed by Article 8). Article 9 leaves those rights and duties untouched; however, Section 9-409 deals with the special case of letters of credit. When chattel paper is composed in part of a negotiable instrument, the obligor on the instrument is not an "account debtor," and Article 3 governs the rights of the assignee of the chattel paper with respect to the issues that this section addresses. See, e.g., Section 3-601 (dealing with discharge of an obligation to pay a negotiable instrument).

28-9-405. Modification of assigned contract. — (a) A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor. This subsection is subject to subsections (b) through (d) of this section.

(b) Subsection (a) of this section applies to the extent that:

(1) The right to payment or a part thereof under an assigned contract has not been fully earned by performance; or

(2) The right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under section 28-9-406(a)[, Idaho Code].

(c) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family or household purposes.

(d) This section does not apply to an assignment of a health care insurance receivable.

History.

I.C., § 28-9-405, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-405, which comprised 1967, ch. 161, § 9-405, p. 351; am. 1978, ch. 162, § 1, p. 351; am. 1979, ch. 299, § 34, p. 781; am. 1991, ch. 69, § 3, p. 165, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertion at the end of paragraph (b)(2) was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. **Source.** Former Section 9-318(2).

2. **Modification of Assigned Contract.** The ability of account debtors and assignors to modify assigned contracts can be important, especially in the case of government contracts and complex contractual arrangements (e.g., construction contracts) with respect to which modifications are customary. Subsections (a) and (b) provide that good-faith modifications of assigned contracts are binding against an assignee to the extent that (i) the right to payment has not been fully earned or (ii) the right to payment has been earned and notification of the assignment has not been given to the account debtor. Former Section 9-318(2) did not validate modifications of fully-performed contracts under any circumstances, whether or not notification of the assignment had been given to the account debtor. Subsection (a) protects the interests of

assignees by (i) limiting the effectiveness of modifications to those made in good faith, (ii) affording the assignee with corresponding rights under the contract as modified, and (iii) recognizing that the modification may be a breach of the assignor's agreement with the assignee.

3. **Consumer Account Debtors.** Subsection (c) is new. It makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors.

4. **Account Debtors on Health-Care-Insurance Receivables.** Subsection (d) also is new. It provides that this section does not apply to an assignment of a health-care-insurance receivable. The obligation of an insurer with respect to a health-care-insurance receivable is governed by other law.

28-9-406. Discharge of account debtor — Notification of assignment — Identification and proof of assignment — Restrictions on assignment of accounts, chattel paper, payment intangibles and promissory notes ineffective. — (a) Subject to subsections (b) through (i) of this section, an account debtor on an account, chattel paper or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the

notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) Subject to subsection (h) of this section, notification is ineffective under subsection (a) of this section:

- (1) If it does not reasonably identify the rights assigned;
- (2) To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this chapter; or
- (3) At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:
 - (A) only a portion of the account, chattel paper or payment intangible has been assigned to that assignee;
 - (B) a portion has been assigned to another assignee; or
 - (C) the account debtor knows that the assignment to that assignee is limited.

(c) Subject to subsection (h) of this section, if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a) of this section.

(d) Except as otherwise provided in subsection (e) of this section and sections 28-9-407 and 28-12-303, Idaho Code, and subject to subsection (h) of this section, a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

- (1) Prohibits, restricts or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection or enforcement of a security interest in, the account, chattel paper, payment intangible or promissory note; or
- (2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible or promissory note.

(e) Subsection (d) of this section does not apply to the sale of a payment intangible or promissory note, other than a sale pursuant to a disposition under section 28-9-610, Idaho Code, or an acceptance of collateral under section 28-9-620, Idaho Code.

(f) Except as otherwise provided in sections 28-9-407 and 28-12-303, Idaho Code, and subject to subsections (h) and (i) of this section, a rule of law, statute, rule or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, rule or regulation:

(1) Prohibits, restricts or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination or remedy under the account or chattel paper.

(g) Subject to subsection (h) of this section, an account debtor may not waive or vary its option under subsection (b)(3) of this section.

(h) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family or household purposes.

(i) This section does not apply to an assignment of a health care insurance receivable, an award of compensation made pursuant to the crime victims compensation act, chapter 10, title 72, Idaho Code, or a lottery prize subject to the provisions of chapter 74, title 67, Idaho Code.

History.

I.C., § 28-9-406, as added by 2001, ch. 208, § 2, p. 704; am. 2012, ch. 145, § 8, p. 381.

STATUTORY NOTES

Prior Laws.

Former § 28-9-406, which comprised 1967, ch. 161, § 9-406, p. 351; am. 1979, ch. 299, § 35, p. 781; am. 1992, ch. 164, § 3, p. 525, was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2012 amendment, by ch. 145, added "other than a sale pursuant to a disposition

under section 28-9-610, Idaho Code, or an acceptance of collateral under section 28-9-620, Idaho Code" to the end of subsection (e).

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS

Cited in: *Foley v. Grigg*, 144 Idaho 530, 164 P.3d 810 (2007).

RESEARCH REFERENCES

A.L.R. — Construction and application of U.C.C. § 9-406 and former U.C.C. § 9-318(3) providing that account debtor is authorized to

pay assignor until receipt of notification to pay assignee. 35 A.L.R.6th 437.

OFFICIAL COMMENT

1. **Source.** Former Section 9-318(3), (4).

2. **Account Debtor's Right to Pay Assignor Until Notification.** Subsection (a) provides the general rule concerning an account debtor's right to pay the assignor until the account debtor receives appropriate notification. The revision makes clear that once the account debtor receives the notification,

the account debtor cannot discharge its obligation by paying the assignor. It also makes explicit that payment to the assignor before notification, or payment to the assignee after notification, discharges the obligation. No change in meaning from former Section 9-318 is intended. Nothing in this section conditions the effectiveness of a notification on the iden-

tity of the person who gives it. An account debtor that doubts whether the right to payment has been assigned may avail itself of the procedures in subsection (c). See Comment 4.

An effective notification under subsection (a) must be authenticated. This requirement normally could be satisfied by sending notification on the notifying person's letterhead or on a form on which the notifying person's name appears. In each case the printed name would be a symbol adopted by the notifying person for the purpose of identifying the person and adopting the notification. See Section 9-102 (defining "authenticate").

Subsection (a) applies only to account debtors on accounts, chattel paper, and payment intangibles. (Section 9-102 defines the term "account debtor" more broadly, to include those obligated on all general intangibles.) Although subsection (a) is more precise than its predecessor, it probably does not change the rule that applied under former Article 9. Former Section 9-318(3) referred to the account debtor's obligation to "pay," indicating that the subsection was limited to account debtors on accounts, chattel paper, and other payment obligations.

3. Limitations on Effectiveness of Notification. Subsection (b) contains some special rules concerning the effectiveness of a notification under subsection (a).

Subsection (b)(1) tracks former Section 9-318(3) by making ineffective a notification that does not reasonably identify the rights assigned. A reasonable identification need not identify the right to payment with specificity, but what is reasonable also is not left to the arbitrary decision of the account debtor. If an account debtor has doubt as to the adequacy of a notification, it may not be safe in disregarding the notification unless it notifies the assignee with reasonable promptness as to the respects in which the account debtor considers the notification defective.

Subsection (b)(2), which is new, applies only to sales of payment intangibles. It makes a notification ineffective to the extent that other law gives effect to an agreement between an account debtor and a seller of a payment intangible that limits the account debtor's duty to pay a person other than the seller. Payment intangibles are substantially less fungible than accounts and chattel paper. In some (e.g., commercial bank loans), account debtors customarily and legitimately expect that they will not be required to pay any person other than the financial institution that has advanced funds.

It has become common in financing transactions to assign interests in a single obligation to more than one assignee. Requiring an account debtor that owes a single obligation to make multiple payments to multiple assignees would be unnecessarily burdensome.

Thus, under subsection (b)(3), an account debtor that is notified to pay an assignee less than the full amount of any installment or other periodic payment has the option to treat the notification as ineffective, ignore the notice, and discharge the assigned obligation by paying the assignor. Some account debtors may not realize that the law affords them the right to ignore certain notices of assignment with impunity. By making the notification ineffective at the account debtor's option, subsection (b)(3) permits an account debtor to pay the assignee in accordance with the notice and thereby to satisfy its obligation *pro tanto*. Under subsection (g), the rights and duties created by subsection (b)(3) cannot be waived or varied.

4. Proof of Assignment. Subsection (c) links payment with discharge, as in subsection (a). It follows former Section 9-318(3) in referring to the right of the account debtor to pay the assignor if the requested proof of assignment is not seasonably forthcoming. Even if the proof is not forthcoming, the notification of assignment would remain effective, so that, in the absence of reasonable proof of the assignment, the account debtor could discharge the obligation by paying either the assignee or the assignor. Of course, if the assignee did not in fact receive an assignment, the account debtor cannot discharge its obligation by paying a putative assignee who is a stranger. The observations in Comment 3 concerning the reasonableness of an identification of a right to payment also apply here. An account debtor that questions the adequacy of proof submitted by an assignee would be well advised to promptly inform the assignee of the defects.

An account debtor may face another problem if its obligation becomes due while the account debtor is awaiting reasonable proof of the assignment that it has requested from the assignee. This section does not excuse the account debtor from timely compliance with its obligations. Consequently, an account debtor that has received a notification of assignment and who has requested reasonable proof of the assignment may discharge its obligation by paying the assignor at the time (or even earlier if reasonably necessary to avoid risk of default) when a payment is due, even if the account debtor has not yet received a response to its request for proof. On the other hand, after requesting reasonable proof of the assignment, an account debtor may not discharge its obligation by paying the assignor substantially in advance of the time that the payment is due unless the assignee has failed to provide the proof seasonably.

5. Contractual Restrictions on Assignment. Former Section 9-318(4) rendered ineffective an agreement between an account debtor and an assignor which prohibited as-

signment of an account (whether outright or to secure an obligation) or prohibited a security assignment of a general intangible for the payment of money due or to become due. Subsection (d) essentially follows former Section 9-318(4), but expands the rule of free assignability to chattel paper (subject to Sections 2A-303 and 9-407) and promissory notes and explicitly overrides both restrictions and prohibitions of assignment. The policies underlying the ineffectiveness of contractual restrictions under this section build on common-law developments that essentially have eliminated legal restrictions on assignments of rights to payment as security and other assignments of rights to payment such as accounts and chattel paper. Any that might linger for accounts and chattel paper are addressed by new subsection (f). See Comment 6.

Former Section 9-318(4) did not apply to a sale of a payment intangible (as described in the former provision, “a general intangible for money due or to become due”) but did apply to an assignment of a payment intangible for security. Subsection (e) continues this approach and also makes subsection (d) inapplicable to sales of promissory notes. Section 9-408 addresses anti-assignment clauses with respect to sales of payment intangibles and promissory notes.

Like former Section 9-318(4), subsection (d) provides that anti-assignment clauses are “ineffective.” The quoted term means that the clause is of no effect whatsoever; the clause does not prevent the assignment from taking effect between the parties and the prohibited assignment does not constitute a default under the agreement between the account debtor and assignor. However, subsection (d) does not override terms that do not directly prohibit, restrict, or require consent to an assignment but which might, nonetheless, present a practical impairment of the assignment. Properly read, however, subsection (d) reaches only covenants that prohibit, restrict, or require consents to assignments; it does not override all terms that might “impair” an assignment in fact.

Example: Buyer enters into an agreement with Seller to buy equipment that Seller is to manufacture according to Buyer’s specifications. Buyer agrees to make a series of prepayments during the construction process. In return, Seller agrees to set aside the prepaid funds in a special account and to use the funds solely for the manufacture of the designated equipment. Seller also agrees that it will not assign any of its rights under the sale agreement with Buyer. Nevertheless, Seller grants to Secured Party a security interest in its accounts. Seller’s anti-assignment agreement is ineffective under subsection (d); its agreement concerning the use of prepaid

funds, which is not a restriction or prohibition on assignment, is not. However, if Secured Party notifies Buyer to make all future payments directly to Secured Party, Buyer will be obliged to do so under subsection (a) if it wishes the payments to discharge its obligation. Unless Secured Party releases the funds to Seller so that Seller can comply with its use-of-funds covenant, Seller will be in breach of that covenant.

In the example, there appears to be a plausible business purpose for the use-of-funds covenant. However, a court may conclude that a covenant with no business purpose other than imposing an impediment to an assignment actually is a direct restriction that is rendered ineffective by subsection (d).

6. Legal Restrictions on Assignment. Former Section 9-318(4), like subsection (d) of this section, addressed only contractual restrictions on assignment. The former section was grounded on the reality that legal, as opposed to contractual, restrictions on assignments of rights to payment had largely disappeared. New subsection (f) codifies this principle of free assignability for accounts and chattel paper. For the most part the discussion of contractual restrictions in Comment 5 applies as well to legal restrictions rendered ineffective under subsection (f).

7. Multiple Assignments. This section, like former Section 9-318, is not a complete codification of the law of assignments of rights to payment. In particular, it is silent concerning many of the ramifications for an account debtor in cases of multiple assignments of the same right. For example, an assignor might assign the same receivable to multiple assignees (which assignments could be either inadvertent or wrongful). Or, the assignor could assign the receivable to assignee-1, which then might re-assign it to assignee-2, and so forth. The rights and duties of an account debtor in the face of multiple assignments and in other circumstances not resolved in the statutory text are left to the common-law rules. See, e.g., Restatement (2d), Contracts §§ 338(3), 339. The failure of former Article 9 to codify these rules does not appear to have caused problems.

8. Consumer Account Debtors. Subsection (h) is new. It makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors.

9. Account Debtors on Health-Care-Insurance Receivables. Subsection (i) also is new. The obligation of an insurer with respect to a health-care-insurance receivable is governed by other law. Section 9-408 addresses contractual and legal restrictions on the assignment of a health-care-insurance receivable.

28-9-407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest. —

(a) Except as otherwise provided in subsection (b) of this section, a term in a lease agreement is ineffective to the extent that it:

(1) Prohibits, restricts or requires the consent of a party to the lease to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, an interest of a party under the lease contract or in the lessor's residual interest in the goods; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

(b) Except as otherwise provided in section 28-12-303(7)[, Idaho Code], a term described in subsection (a)(2) of this section is effective to the extent that there is:

(1) A transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term; or

(2) A delegation of a material performance of either party to the lease contract in violation of the term.

(c) The creation, attachment, perfection or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of section 28-12-303(4)[, Idaho Code,] unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor.

History.

I.C., § 28-9-407, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-407, which comprised 1967, ch. 161, § 9-407, p. 351; am. 1979, ch. 299, § 36, p. 781; am. 1981, ch. 203, § 2, p. 364; am. 1982, ch. 218, § 1, p. 593; am. 1986, ch. 338, § 7, p. 834; am. 1990, ch. 205, § 3, p. 457; am. 1993, ch. 33, § 1, p. 108, was repealed by S.L. 2001, ch. 208, § 1.

Compiler's Notes.

The bracketed insertions in the introductory paragraph in subsection (b) and in subsection (c) were added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. **Source.** Section 2A-303.

2. **Restrictions on Assignment Generally Ineffective.** Under subsection (a), as under former Section 2A-303(3), a term in a lease agreement which prohibits or restricts the creation of a security interest generally is ineffective. This reflects the general policy of Section 9-406(d) and former Section 9-318(4). This section has been conformed in several

respects to analogous provisions in Sections 9-406, 9-408, and 9-409, including the substitution of "ineffective" for "not enforceable" and the substitution of "assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest" for "creation or enforcement of a security interest."

3. **Exceptions for Certain Transfers and Delegations.** Subsection (b) provides

exceptions to the general ineffectiveness of restrictions under subsection (a). A term that otherwise is ineffective under subsection (a)(2) is effective to the extent that a lessee transfers its right to possession and use of goods or if either party delegates material performance of the lease contract in violation of the term. However, under subsection (c), as under former Section 2A-303(3), a lessor's creation of a security interest in its interest in a lease contract or its residual interest in the

leased goods is not a material impairment under Section 2A-303(4) (former Section 2A-303(5)), absent an actual delegation of the lessor's material performance. The terms of the lease contract determine whether the lessor, in fact, has any remaining obligations to perform. If it does, it is then necessary to determine whether there has been an actual delegation of "material performance." See Section 2A-303, Comments 3 and 4.

28-9-408. Restrictions on assignment of promissory notes, health care insurance receivables, and certain general intangibles ineffective. — (a) Except as otherwise provided in subsection (b) of this section, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health care insurance receivable, or general intangible, is ineffective to the extent that the term:

- (1) Would impair the creation, attachment or perfection of a security interest; or
- (2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible.

(b) Subsection (a) of this section applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note, other than a sale pursuant to a disposition under section 28-9-610, Idaho Code, or an acceptance of collateral under section 28-9-620, Idaho Code.

(c) A rule of law, statute, rule or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health care insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute or regulation:

- (1) Would impair the creation, attachment or perfection of a security interest; or
- (2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible.

(d) To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care

insurance receivable or general intangible or a rule of law, statute or regulation described in subsection (c) of this section would be effective under law other than this chapter but is ineffective under subsection (a) or (c) of this section, the creation, attachment, or perfection of a security interest in the promissory note, health care insurance receivable, or general intangible:

- (1) Is not enforceable against the person obligated on the promissory note or the account debtor;
- (2) Does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;
- (3) Does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;
- (4) Does not entitle the secured party to use or assign the debtor's rights under the promissory note, health care insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health care insurance receivable, or general intangible;
- (5) Does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and
- (6) Does not entitle the secured party to enforce the security interest in the promissory note, health care insurance receivable, or general intangible.

History.

I.C., § 28-9-408, as added by 2001, ch. 208, § 2, p. 704; am. 2012, ch. 145, § 9, p. 381.

STATUTORY NOTES

Prior Laws.

Former section 28-9-408 which comprised 1967, ch. 161, § 9-408, p. 351 was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2012 amendment, by ch. 145, added "other than a sale pursuant to a disposition

under section 28-9-610, Idaho Code, or an acceptance of collateral under section 28-9-620, Idaho Code" in subsection (b).

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

OFFICIAL COMMENT

1. Source. New.

2. Free Assignability. This section makes ineffective any attempt to restrict the assignment of a general intangible, health-care-insurance receivable, or promissory note, whether the restriction appears in the terms of a promissory note or the agreement between an account debtor and a debtor (subsection (a)) or in a rule of law, including a statute or governmental rule or regulation (subsection (c)). This result allows the creation, attachment, and perfection of a security interest in a general intangible, such as

an agreement for the nonexclusive license of software, as well as sales of certain receivables, such as a health-care-insurance receivable (which is an "account"), payment intangible, or promissory note, without giving rise to a default or breach by the assignor or from triggering a remedy of the account debtor or person obligated on a promissory note. This enhances the ability of certain debtors to obtain credit. On the other hand, subsection (d) protects the other party-the "account debtor" on a general intangible or the person obligated on a promissory note-from adverse

effects arising from the security interest. It leaves the account debtor's or obligated person's rights and obligations unaffected in all material respects if a restriction rendered ineffective by subsection (a) or (c) would be effective under law other than Article 9.

Example 1: A term of an agreement for the nonexclusive license of computer software prohibits the licensee from assigning any of its rights as licensee with respect to the software. The agreement also provides that an attempt to assign rights in violation of the restriction is a default entitling the licensor to terminate the license agreement. The licensee, as debtor, grants to a secured party a security interest in its rights under the license and in the computers in which it is installed. Under this section, the term prohibiting assignment and providing for a default upon an attempted assignment is ineffective to prevent the creation, attachment, or perfection of the security interest or entitle the licensor to terminate the license agreement. However, under subsection (d), the secured party (absent the licensor's agreement) is not entitled to enforce the license or to use, assign, or otherwise enjoy the benefits of the licensed software, and the licensor need not recognize (or pay any attention to) the secured party. Even if the secured party takes possession of the computers on the debtor's default, the debtor would remain free to remove the software from the computer, load it on another computer, and continue to use it, if the license so permits. If the debtor does not remove the software, other law may require the secured party to remove it before disposing of the computer. Disposition of the software with the computer could violate an effective prohibition on enforcement of the security interest. See subsection (d).

3. Nature of Debtor's Interest. Neither this section nor any other provision of this Article determines whether a debtor has a property interest. The definition of the term "security interest" provides that it is an "interest in personal property." See Section 1-201(b)(35). Ordinarily, a debtor can create a security interest in collateral only if it has "rights in the collateral." See Section 9-203(b). Other law determines whether a debtor has a property interest ("rights in the collateral") and the nature of that interest. For example, the nonexclusive license addressed in Example 1 may not create any property interest whatsoever in the intellectual property (e.g., copyright) that underlies the license and that effectively enables the licensor to grant the license. The debtor's property interest may be confined solely to its interest in the promises made by the licensor in the license agreement (e.g., a promise not to sue the debtor for its use of the software).

4. Scope: Sales of Payment Intangibles and Other General Intangibles; Assignments Unaffected by this Section. Subsections (a) and (c) render ineffective restrictions on assignments only "to the extent" that the assignments restrict the "creation, attachment, or perfection of a security interest," including sales of payment intangibles and promissory notes. This section does not render ineffective a restriction on an assignment that does not create a security interest. For example, if the debtor in Comment 2, Example 1 purported to assign the license to another entity that would use the computer software itself, other law would govern the effectiveness of the anti-assignment provisions.

Subsection (a) applies to a security interest in payment intangibles only if the security interest arises out of sale of the payment intangibles. Contractual restrictions directed to security interests in payment intangibles which secure an obligation are subject to Section 9-406(d). Subsection (a) also deals with sales of promissory notes which also create security interests. See Section 9-109(a). Subsection (c) deals with all security interests in payment intangibles or promissory notes, whether or not arising out of a sale.

Subsection (a) does not render ineffective any term, and subsection (c) does not render ineffective any law, statute or regulation, that restricts outright sales of general intangibles other than payment intangibles. They deal only with restrictions on security interests. The only sales of general intangibles that create security interests are sales of payment intangibles.

5. Terminology: "Account Debtor"; "Person Obligated on a Promissory Note." This section uses the term "account debtor" as it is defined in Section 9-102. The term refers to the party, other than the debtor, to a general intangible, including a permit, license, franchise, or the like, and the person obligated on a health-care-insurance receivable, which is a type of account. The definition of "account debtor" does not limit the term to persons who are obligated to *pay* under a general intangible. Rather, the term includes all persons who are obligated on a general intangible, including those who are obligated to render performance in exchange for payment. In some cases, e.g., the creation of a security interest in a franchisee's rights under a franchise agreement, the principal payment obligation may be owed by the debtor (franchisee) to the account debtor (franchisor). This section also refers to a "person obligated on a promissory note," inasmuch as those persons do not fall within the definition of "account debtor."

Example 2: A licensor and licensee enter into an agreement for the nonexclusive license of computer software. The licensee's interest in the license agreement is a general intangible. If the licensee grants to a secured party a security interest in its rights under the license agreement, the licensee is the debtor and the licensor is the account debtor. On the other hand, if the licensor grants to a secured party a security interest in its right to payment (an account) under the license agreement, the licensor is the debtor and the licensee is the account debtor. (This section applies to the security interest in the general intangible but not to the security interest in the account, which is not a health-care-insurance receivable.)

6. Effects on Account Debtors and Persons Obligated on Promissory Notes. Subsections (a) and (c) affect two classes of persons. These subsections affect account debtors on general intangibles and health-care-insurance receivables and persons obligated on promissory notes. Subsection (c) also affects governmental entities that enact or determine rules of law. *However, subsection (d) ensures that these affected persons are not affected adversely.* That provision removes any burdens or adverse effects on these persons for which any rational basis could exist to restrict the effectiveness of an assignment or to exercise any remedies. For this reason, the effects of subsections (a) and (c) are immaterial insofar as those persons are concerned.

Subsection (a) does not override terms that do not directly prohibit, restrict, or require consent to an assignment but which might, nonetheless, present a practical impairment of the assignment. Properly read, however, this section, like Section 9-406(d), reaches only covenants that prohibit, restrict, or require consents to assignments; it does not override all terms that might "impair" an assignment in fact.

Example 3: A licensor and licensee enter into an agreement for the nonexclusive license of valuable business software. The license agreement includes terms (i) prohibiting the licensee from assigning its rights under the license, (ii) prohibiting the licensee from disclosing to anyone certain information relating to the software and the licensor, and (iii) deeming prohibited assignments and prohibited disclosures to be defaults. The licensee wishes to obtain financing and, in exchange, is willing to grant a security interest in its rights under the license agreement. The secured party, reasonably, refuses to extend credit unless the licensee discloses the information that it is prohibited from disclosing under the license agreement. The secured party cannot determine the value of the proposed collateral in the absence of this infor-

mation. Under this section, the terms of the license prohibiting the assignment (grant of the security interest) and making the assignment a default are ineffective. However, the nondisclosure covenant is not a term that prohibits the assignment or creation of a security interest in the license. Consequently, the nondisclosure term is enforceable even though the *practical* effect is to restrict the licensee's ability to use its rights under the license agreement as collateral.

The nondisclosure term also would be effective in the factual setting of Comment 2, Example 1. If the secured party's possession of the computers loaded with software would put it in a position to discover confidential information that the debtor was prohibited from disclosing, the licensor should be entitled to enforce its rights against the secured party. Moreover, the licensor could have required the debtor to obtain the secured party's agreement that (i) it would immediately return all copies of software loaded on the computers and that (ii) it would not examine or otherwise acquire any information contained in the software. This section does not prevent an account debtor from protecting by agreement its independent interests that are unrelated to the "creation, attachment, or perfection" of a security interest. In Example 1, moreover, the secured party is not in possession of copies of software by virtue of its security interest or in connection with enforcing its security interest *in the debtor's license of the software*. Its possession is incidental to its possession of the computers, in which it has a security interest. Enforcing against the secured party a restriction relating to the software in no way interferes with its security interest in the computers.

7. Effect in Assignor's Bankruptcy. This section could have a substantial effect if the assignor enters bankruptcy. Roughly speaking, Bankruptcy Code Section 552 invalidates security interests in property acquired after a bankruptcy petition is filed, except to the extent that the postpetition property constitutes proceeds of prepetition collateral.

Example 4: A debtor is the owner of a cable television franchise that, under applicable law, cannot be assigned without the consent of the municipal franchisor. A lender wishes to extend credit to the debtor, provided that the credit is secured by the debtor's "going business" value. To secure the loan, the debtor grants a security interest in all its existing and after-acquired property. The franchise represents the principal value of the business. The municipality refuses to consent to any assignment for collateral purposes. If other law were given effect, the security interest in the franchise would not attach; and if the debtor were to enter bankruptcy and sell the

business, the secured party would receive but a fraction of the business's value. Under this section, however, the security interest would attach to the franchise. As a result, the security interest would attach to the proceeds of any sale of the franchise while a bankruptcy is pending. However, this section would protect the interests of the municipality by preventing the secured party from enforcing its security interest to the detriment of the municipality.

8. Effect Outside of Bankruptcy. The principal effects of this section will take place outside of bankruptcy. Compared to the relatively few debtors that enter bankruptcy, there are many more that do not. By making available previously unavailable property as collateral, this section should enable debtors to obtain additional credit. For purposes of determining whether to extend credit, under some circumstances a secured party may ascribe value to the collateral to which its security interest has attached, even if this section precludes the secured party from enforcing the security interest without the agreement of the account debtor or person obligated on the promissory note. This may be the case where

the secured party sees a likelihood of obtaining that agreement in the future. This may also be the case where the secured party anticipates that the collateral will give rise to a type of proceeds as to which this section would not apply.

Example 5: Under the facts of Example 4, the debtor does not enter bankruptcy. Perhaps in exchange for a fee, the municipality agrees that the debtor may transfer the franchise to a buyer. As consideration for the transfer, the debtor receives from the buyer its check for part of the purchase price and its promissory note for the balance. The security interest attaches to the check and promissory note as proceeds. See Section 9-315(a)(2). This section does not apply to the security interest in the check, which is not a promissory note, health-care-insurance receivable, or general intangible. Nor does it apply to the security interest in the promissory note, inasmuch as it was not sold to the secured party.

9. Contrary Federal Law. This section does not override federal law to the contrary. However, it does reflect an important policy judgment that should provide a template for future federal law reforms.

28-9-409. Restrictions on assignment of letter of credit rights ineffective. — (a) A term in a letter of credit or a rule of law, statute, rule, regulation, custom or practice applicable to the letter of credit which prohibits, restricts or requires the consent of an applicant, issuer or nominated person to a beneficiary's assignment of or creation of a security interest in a letter of credit right is ineffective to the extent that the term or rule of law, statute, rule, regulation, custom or practice:

- (1) Would impair the creation, attachment or perfection of a security interest in the letter of credit right; or
- (2) Provides that the assignment or the creation, attachment or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter of credit right.

(b) To the extent that a term in a letter of credit is ineffective under subsection (a) of this section but would be effective under law other than this chapter or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, the creation, attachment, or perfection of a security interest in the letter of credit right:

- (1) Is not enforceable against the applicant, issuer, nominated person or transferee beneficiary;
- (2) Imposes no duties or obligations on the applicant, issuer, nominated person or transferee beneficiary; and
- (3) Does not require the applicant, issuer, nominated person or transferee beneficiary to recognize the security interest, pay or render performance

to the secured party, or accept payment or other performance from the secured party.

History.

I.C., § 28-9-409, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after
July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. Purpose and Relevance. This section, patterned on Section 9-408, limits the effectiveness of attempts to restrict the creation, attachment, or perfection of a security interest in letter-of-credit rights, whether the restriction appears in the letter of credit or a rule of law, custom, or practice applicable to the letter of credit. It protects the creation, attachment, and perfection of a security interest while preventing these events from giving rise to a default or breach by the assignor or from triggering a remedy or defense of the issuer or other person obligated on a letter of credit. Letter-of-credit rights are a type of supporting obligation. See Section 9-102. Under Sections 9-203 and 9-308, a security interest in a supporting obligation attaches and is perfected automatically if the security interest in the supported obligation attaches and is perfected. See Section 9-107, Comment 5. The automatic attachment and perfection under Article 9 would be anomalous or misleading if, under other law (e.g., Article 5), a

restriction on transfer or assignment were effective to block attachment and perfection.

3. Relationship to Letter-of-Credit Law. Although restrictions on an assignment of a letter of credit are ineffective to prevent creation, attachment, and perfection of a security interest, subsection (b) protects the issuer and other parties from any adverse effects of the security interest by preserving letter-of-credit law and practice that limits the right of a beneficiary to transfer its right to draw or otherwise demand performance (Section 5-112) and limits the obligation of an issuer or nominated person to recognize a beneficiary's assignment of letter-of-credit proceeds (Section 5-114). Thus, this section's treatment of letter-of-credit rights differs from this Article's treatment of instruments and investment property. Moreover, under Section 9-109(c)(4), this Article does not apply to the extent that the rights of a transferee beneficiary or nominated person are independent and superior under Section 5-114, thereby preserving the "independence principle" of letter-of-credit law.

PART 5. FILING

28-9-501. Filing office. — (a) Except as otherwise provided in subsection (b) of this section, if the local law of this state governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) The office designated for the filing or recording of a record of a mortgage on the related real property, if:

(A) the collateral is as-extracted collateral or timber to be cut; or

(B) the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(2) The office of the secretary of state or any office duly authorized by the secretary of state, in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(b) The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office

of the secretary of state. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become a fixture.

History.

I.C., § 28-9-501, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Prior Laws.

ch. 161, § 9-501, p. 351, was repealed by S.L.
2001, ch. 208, § 1.

Former § 28-9-501, which comprised 1967,

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Construction.
Filing with secretary of state.
Knowledge not operating to destroy lien.
Laws of Idaho Controlling.
Note barred by statute of limitation excluded from evidence.
Oral consent for removal admissible.
Possession by mortgagor.
Presumption of situs.
Principle of comity.
Protection intended for whom.
Removal of mortgaged property.
Sufficiency of evidence to show non-consent.

Construction.

Nothing less than written consent to removal of property would require mortgagee to record his mortgage elsewhere than in original county or lose his lien in default thereof. *Young v. Boise Payette Lumber Co.*, 45 Idaho 671, 264 P. 873 (1928).

Filing With Secretary of State.

Secretary of state was not warranted in refusing to accept and file instrument, until it was shown that mortgage had been previously filed with county recorder and had not been satisfied or released. *State ex rel. Capital Inv. Co. v. Lukens*, 48 Idaho 357, 283 P. 527 (1929).

Knowledge Not Operating to Destroy Lien.

If written consent for the shipment of mortgaged property out of the state were not given by the mortgagee, he did not lose his lien, notwithstanding the fact he had knowledge thereof. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933).

Laws of Idaho Controlling.

Where wheat was shipped from a warehouse in Idaho to another warehouse in another state, belonging to the same corpora-

tion, and the warehouse owner was sued for conversion by reason of this transaction, the rights of the parties were determinable by the laws of Idaho. *Globe Grain & Milling Co. v. De Tweede N.W. & Pac. Hypotheekbank*, 69 F.2d 418 (9th Cir. 1934).

Note Barred by Statute of Limitation Excluded from Evidence.

Where an action was brought against a third party by the holder of a chattel mortgage, it was not error to exclude from the evidence copies of the chattel mortgage and any assignment thereof that may have been made, where it appeared that the note secured by the mortgage was apparently barred by the statute of limitations. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 101 F.2d 458 (9th Cir. 1939).

Oral Consent for Removal Admissible.

In an action where mortgaged property had been removed, it was error to refuse to receive evidence that the mortgagee orally consented to such removal of sale, notwithstanding the statute required written consent. *Globe Grain & Milling Co. v. De Tweede N.W. & Pac. Hypotheekbank*, 69 F.2d 418 (9th Cir. 1934).

Possession by Mortgagor.

Possession by the mortgagor or others,

where the mortgage was authenticated and filed, was contemplated, but the lien preserved. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933).

Presumption of Situs.

Mortgaged property was presumed to be in the county on the date the mortgage was recorded. *United States v. White*, 143 F. Supp. 754 (D. Idaho 1956).

Principle of Comity.

Former section did not regulate the rights of parties where the property was removed from the state, but the mortgagee's rights were protected and governed in the state to which the property was removed by the principle of comity. *Globe Grain & Milling Co. v. De Tweede N.W. & Pac. Hypotheekbank*, 69 F.2d 418 (9th Cir. 1934).

Protection Intended for Whom.

The purpose of former section was to protect a mortgagee in case the mortgaged property was removed without his knowledge or consent from the county in which the chattel

mortgage was recorded and to protect innocent purchasers or encumbrancers or attachment or judgment creditors, where there was no evidence in the recorder's office, or in the office of the secretary of state, of the existing mortgage. *Globe Grain & Milling Co. v. De Tweede N.W. & Pac. Hypotheekbank*, 69 F.2d 418 (9th Cir. 1934).

Removal of Mortgaged Property.

In absence of specific statutory provision, requiring further recordation upon removal of mortgaged property, record of chattel mortgage in county where it was required to be originally filed is constructive notice to all the world, although property might be moved to another county. *Young v. Boise Payette Lumber Co.*, 45 Idaho 671, 264 P. 873 (1928).

Sufficiency of Evidence to Show Non-consent.

Evidence in the cited case was sufficient to show that the mortgagee did not consent to a sale of the mortgaged chattels, so as to waive his lien. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933).

RESEARCH REFERENCES

C.J.S. — 79 C.J.S., Secured Transactions, § 48 et seq.

OFFICIAL COMMENT

1. **Source.** Derived from former Section 9-401.

2. **Where to File.** Subsection (a) indicates where in a given State a financing statement is to be filed. Former Article 9 afforded each State three alternative approaches, depending on the extent to which the State desires central filing (usually with the Secretary of State), local filing (usually with a county office), or both. As Comment 1 to former Section 9-401 observed, "The principal advantage of state-wide filing is ease of access to the credit information which the files exist to provide. Consider for example the national distributor who wishes to have current information about the credit standing of the thousands of persons he sells to on credit. The more completely the files are centralized on a state-wide basis, the easier and cheaper it becomes to procure credit information; the more the files are scattered in local filing units, the more burdensome and costly." Local filing increases the net costs of secured transactions also by increasing uncertainty and the number of required filings. Any benefit that local filing may have had in the 1950's is now insubstantial. Accordingly, this Article dictates central filing for most situations, while retaining local filing for real-estate-related

collateral and special filing provisions for transmitting utilities.

3. **Minerals and Timber.** Under subsection (a)(1), a filing in the office where a record of a mortgage on the related real property would be filed will perfect a security interest in as-extracted collateral. Inasmuch as the security interest does not attach until extraction, the filing continues to be effective after extraction. A different result occurs with respect to timber to be cut, however. Unlike as-extracted collateral, standing timber may be goods before it is cut. See Section 9-102 (defining "goods"). Once cut, however, it is no longer timber *to be* cut, and the filing in the real-property-mortgage office ceases to be effective. The timber then becomes ordinary goods, and filing in the office specified in subsection (a)(2) is necessary for perfection. Note also that after the timber is cut the law of the debtor's location, not the location of the timber, governs perfection under Section 9-301.

4. **Fixtures.** There are two ways in which a secured party may file a financing statement to perfect a security interest in goods that are or are to become fixtures. It may file in the Article 9 records, as with most other goods. See subsection (a)(2). Or it may file the

financing statement as a “fixture filing,” defined in Section 9-102, in the office in which a record of a mortgage on the related real property would be filed. See subsection(a)(1)(B).

5. **Transmitting Utilities.** The usual filing rules do not apply well for a transmitting utility (defined in Section 9-102). Many pre-UCC statutes provided special filing rules for railroads and in some cases for other public utilities, to avoid the requirements for filing with legal descriptions in every county in which such debtors had property. Former Section 9-401(5) recreated and broadened these provisions, and subsection (b) follows this approach. The nature of the debtor will in-

form persons searching the record as to where to make a search.

A given State’s subsection (b) applies only if the local law of that State governs perfection. As to most collateral, perfection by filing is governed by the law of the jurisdiction in which the debtor is located. See Section 9-301(1). However, the law of the jurisdiction in which goods that are or become fixtures are located governs perfection by filing a fixture filing. See Section 9-301(3)(A). As a consequence, filing in the filing office of more than one State may be necessary to perfect a security interest in fixtures collateral of a transmitting utility by filing a fixture filing. See Section 9-301, Comment 5.b.

28-9-502. Contents of financing statement — Record of mortgage as financing statement — Time of filing financing statement — Farm products. — (a) Subject to subsection (b) of this section, a financing statement is sufficient only if it:

- (1) Provides the name of the debtor;
- (2) Provides the name of the secured party or a representative of the secured party; and
- (3) Indicates the collateral covered by the financing statement.

(b) Except as otherwise provided in section 28-9-501(b), Idaho Code, to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) of this section and also:

- (1) Indicate that it covers this type of collateral;
- (2) Indicate that it is to be filed in the real property records;
- (3) Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and
- (4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

- (1) The record indicates the goods or accounts that it covers;
- (2) The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;
- (3) The record satisfies the requirements for a financing statement in this section, but:

(A) the record need not indicate that it is to be filed in the real property records; and

(B) the record sufficiently provides the name of a debtor who is an individual if it provides the individual name of the debtor or the surname and first personal name of the debtor, even if the debtor is an individual to whom section 28-9-503(a)(4), Idaho Code, applies; and

- (4) The record is recorded.
- (d) A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.
- (e) A financing statement covering farm products is sufficient if it:
- (1) Contains the names and addresses of both the debtor and the secured party;
 - (2) Is signed, authorized or otherwise authenticated by the debtor;
 - (3) Contains the debtor's social security number or other unique number, combination of numbers and letters, or other identifier selected by the secretary of state using a selection system or method approved by the secretary of agriculture, or in the case of a debtor doing business other than as an individual, the debtor's internal revenue service taxpayer identification number or other approved unique identifier;
 - (4) Contains a description by category of the farm products subject to the security interest and the amount of such products, where applicable;
 - (5) Indicates the county or counties in which the farm products are produced or located.
- (f) A financing statement covering farm products must be amended in writing and similarly signed, authorized or authenticated, and filed, to reflect any material changes. In the event such form is not incorporated within the financing statement, the effectiveness and continuation of that form is to be treated as if it were a part of the financing statement with which it is filed.
- (g) If the financing statement covering farm products, or an amendment to such statement, is filed electronically, neither the debtor's nor the secured party's signature shall be required.
- (h) In order to terminate a financing statement covering farm products, the amendment must be terminated in writing and signed or authenticated by the secured party.

History.

I.C., § 28-9-502, as added by 2001, ch. 208, § 2, p. 704; am. 2007, ch. 317, § 1, p. 945; am. 2012, ch. 145, § 10, p. 381.

STATUTORY NOTES**Prior Laws.**

Former § 28-9-502, which comprised 1967, ch. 161, § 9-502, p. 351; am. 1979, ch. 299, § 38, p. 781, was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2007 amendment, by ch. 317, rewrote subsection (e) to the extent that a detailed comparison is impracticable; in subsection (f), substituted "financing statement covering farm products" for "financing statement described in subsection (e) of this section," deleted "within three (3) months" following

"amended in writing," and inserted "authorized or authenticated"; and added subsections (g) and (h).

The 2012 amendment, by ch. 145, rewrote paragraph (c)(3) which read: "The record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records."

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Addresses of debtor.
 Addresses.
 Collateral covered by financing statement.
 —In general.
 —After-acquired property.
 —Equipment.
 —Tools.
 Crops.
 Failure of debtor to sign.
 Failure to execute in favor of secured party.
 Financing statement more limited than security agreement.
 Improper cross-reference.
 Purpose.
 "Signed by the debtor."

Addresses of Debtor.

Financing statement that did not contain the address of the debtors did not substantially comply with this section; therefore, security interest was unperfected and petitioners had no enforceable interest in the property to support an abandonment under 11 USCS § 554. *In re Keefer*, 26 Bankr. 597 (Bankr. D. Idaho 1983).

Addresses.

The function of the financing statement requirement is to give notice of a potential interest in property of a specifically identified debtor, as well as means by which an inquiring party may acquire more detailed information concerning that interest; therefore, a financing statement which did not contain the address of either the debtor or the creditor did not contain the information required by this section, and the filing of such a statement did not constitute perfection of the security interest. *Wood v. Pillsbury Co.*, 38 Bankr. 375 (Bankr. D. Idaho 1983).

When the secured party is a business entity, identification of that party by name and by reference to the town in which the relevant office of that business entity is located is sufficient to meet the requirements of this section; further information concerning the interest could readily be obtained by an inquiring party based upon this information. *Wood v. Pillsbury Co.*, 38 Bankr. 375 (Bankr. D. Idaho 1983).

Collateral Covered by Financing Statement.**—In General.**

The purpose of a financing statement is to give public notice of the type of collateral that may be subject to a security interest and that purpose is subverted if a third-party cannot reasonably ascertain from the financing state-

ment the type of collateral, as distinguished from the particular items of collateral, which may be subject to a particular security interest. *Sweney v. Cardinal Doors, Inc. (In re Door Supply Ctr., Inc.)*, 3 Bankr. 103 (Bankr. D. Idaho 1980).

—After-Acquired Property.

A financing statement describing certain collateral puts the world on notice not only of a secured interest in that particular type of property, but also alerts third-party creditors to the fact that a perfected secured interest may attach to any after-acquired property of the type referred to in the financing statement; thus, any after-acquired property of the type listed in the financing statement is perfected. *Sweney v. Cardinal Doors, Inc. (In re Door Supply Ctr., Inc.)*, 3 Bankr. 103 (Bankr. D. Idaho 1980).

—Equipment.

Where the security agreement covered "office equipment" and the financing statement covered "equipment", the broader language of the financing statement could not expand the security provided for in the security agreement; thus, the trustee was entitled to sell any equipment or machinery owned by the bankrupt which was not "office equipment." *Sweney v. Cardinal Doors, Inc. (In re Door Supply Ctr., Inc.)*, 3 Bankr. 103 (Bankr. D. Idaho 1980).

—Tools.

Where financing statement explicitly covered "tools," the term "tool" could only cover a hand operated device or instrument used to facilitate mechanical operations and not a piece of powered machinery, since a tool can be a simple inexpensive machine but not a complicated one. *Sweney v. Cardinal Doors, Inc. (In re Door Supply Ctr., Inc.)*, 3 Bankr. 103 (Bankr. D. Idaho 1980).

Crops.

A financing statement that was filed to cover crops growing or to be grown did not meet the requirements of this section in that it did not also contain a description of the real estate concerned. *Wood v. Pillsbury Co.*, 38 Bankr. 375 (Bankr. D. Idaho 1983).

Failure of Debtor to Sign.

Where financing statement was not signed by debtor as required by this section, the financing statement was not invalid as to the creditor, since a diligent creditor who checked the financing statement would have been put on notice of the claimed lien by the corporate creditor. *Sweney v. Cardinal Doors, Inc. (In re Door Supply Ctr., Inc.)*, 3 Bankr. 103 (Bankr. D. Idaho 1980).

Failure to Execute in Favor of Secured Party.

A secured party's perfected security interest lapses when the collateral is sold with the secured party's consent, where the secured party does not condition its consent to the transfer upon the simultaneous execution of a security agreement and financing statement by the transferee in favor of the secured party. *Trustee Servs. Corp. v. East River Lumber Co. (In re Hodge Forest Indus., Inc.)*, 59 Bankr. 801 (Bankr. D. Idaho 1986).

Financing Statement More Limited than Security Agreement.

A financing statement, if more limited in scope than the security agreement which it perfects, limits the collateral in which the

creditor has a perfected security interest to that description as against third-party creditors and a trustee in bankruptcy. *Sweney v. Cardinal Doors, Inc. (In re Door Supply Ctr., Inc.)*, 3 Bankr. 103 (Bankr. D. Idaho 1980).

Improper Cross-Reference.

Where secretary of state failed to properly cross-reference individual debtor with corporate bankrupt debtor in indexing financing statement, defendant creditor would not be penalized and secured interest would be enforced; since, if proper cross-referencing had occurred, any third-party creditor could have found the existing lien on the debtor's property. *Sweney v. Cardinal Doors, Inc. (In re Door Supply Ctr., Inc.)*, 3 Bankr. 103 (Bankr. D. Idaho 1980).

Purpose.

The purpose of listing a lienholder's interests on a certificate of title is similar to the policy behind this article's requirement that financing statements be filed of record; that purpose is to provide inquiry notice to third parties. *Simplot v. Owens*, 119 Idaho 243, 805 P.2d 477 (Ct. App. 1990).

"Signed by the Debtor."

"Signed by the debtor" means only that the security agreement had been signed by the debtor, and a photocopy of that document is sufficient to perfect a security interest; "signed by the debtor" does not require that the signed photocopy of the security agreement be impressed with an original signature when filed in order to perfect a security interest. *J.K. Merrill & Son v. Carter*, 108 Idaho 749, 702 P.2d 787 (1985).

OPINIONS OF ATTORNEY GENERAL**Farm Products.**

The designation of the county alone is a reasonable and legally sufficient description of the real estate on which farm products are

grown or located, for the purpose of perfecting a security interest in farm products by filing a farm products financing statement. OAG 86-17.

OFFICIAL COMMENT

1. **Source.** Former Section 9-402(1), (5), (6).

2. **"Notice Filing."** This section adopts the system of "notice filing." What is required to be filed is not, as under pre-UCC chattel mortgage and conditional sales acts, the security agreement itself, but only a simple record providing a limited amount of information (financing statement). The financing statement may be filed before the security interest attaches or thereafter. See subsection (d). See also Section 9-308(a) (contemplating situations in which a financing statement is filed before a security interest attaches).

The notice itself indicates merely that a person may have a security interest in the

collateral indicated. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-210 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. However, in many cases, information may be forthcoming without the need to resort to the formalities of that section.

Notice filing has proved to be of great use in financing transactions involving inventory, accounts, and chattel paper, because it obviates the necessity of refileing on each of a series of transactions in a continuing arrangement under which the collateral changes from day to day. However, even in the case of filings

that do not necessarily involve a series of transactions (e.g., a loan secured by a single item of equipment), a financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the indication of collateral in the financing statement is sufficient to cover the collateral concerned. Similarly, a financing statement is effective to cover after-acquired property of the type indicated and to perfect with respect to future advances under security agreements, regardless of whether after-acquired property or future advances are mentioned in the financing statement and even if not in the contemplation of the parties at the time the financing statement was authorized to be filed.

3. Debtor's Signature; Required Authorization. Subsection (a) sets forth the simple formal requirements for an effective financing statement. These requirements are: (1) the debtor's name; (2) the name of a secured party or representative of the secured party; and (3) an indication of the collateral.

Whereas former Section 9-402(1) required the debtor's signature to appear on a financing statement, this Article contains no signature requirement. The elimination of the signature requirement facilitates paperless filing. (However, as PEB Commentary No. 15 indicates, a paperless financing statement was sufficient under former Article 9.) Elimination of the signature requirement also makes the exceptions provided by former Section 9-402(2) unnecessary.

The fact that this Article does not require that an authenticating symbol be contained in the public record does not mean that all filings are authorized. Rather, Section 9-509(a) entitles a person to file an initial financing statement, an amendment that adds collateral, or an amendment that adds a debtor only if the debtor authorizes the filing, and Section 9-509(d) entitles a person other than the debtor to file a termination statement only if the secured party of record authorizes the filing. Of course, a filing has legal effect only to the extent it is authorized. See Section 9-510.

Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this Article. See Sections 1-103 and 9-509, Comment 3. However, under Section 9-509(b), the debtor's authentication of (or becoming bound by) a security agreement ipso facto constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization.

Section 9-625 provides a remedy for unauthorized filings. Making an unauthorized filing also may give rise to civil or criminal liability under other law. In addition, this Article contains provisions that assist in the discovery of unauthorized filings and the amelioration of their practical effect. For example, Section 9-518 provides a procedure whereby a person may add to the public record a statement to the effect that a financing statement indexed under the person's name was wrongfully filed, and Section 9-509(d) entitles any person to file a termination statement if the secured party of record fails to comply with its obligation to file or send one to the debtor, the debtor authorizes the filing, and the termination statement so indicates. However, the filing office is neither obligated nor permitted to inquire into issues of authorization. See Section 9-520(a).

4. Certain Other Requirements. Subsection (a) deletes other provisions of former Section 9-402(1) because they seem unwise (real-property description for financing statements covering crops), unnecessary (adequacy of copies of financing statements), or both (copy of security agreement as financing statement). In addition, the filing office must reject a financing statement lacking certain other information formerly required as a condition of perfection (e.g., an address for the debtor or secured party). See Sections 9-516(b), 9-520(a). However, if the filing office accepts the record, it is effective nevertheless. See Section 9-520(c).

5. Real-Property-Related Filings. Subsection (b) contains the requirements for financing statements filed as fixture filings and financing statements covering timber to be cut or minerals and minerals-related accounts constituting as-extracted collateral. A description of the related real property must be sufficient to reasonably identify it. See Section 9-108. This formulation rejects the view that the real property description must be by metes and bounds, or otherwise conforming to traditional real-property practice in conveyancing, but, of course, the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real property must be sufficient so that the financing statement will fit into the real-property search system and be found by a real-property searcher. Under the optional language in subsection (b)(3), the test of adequacy of the description is whether it would be adequate in a record of a mortgage of the real property. As suggested in the Legislative Note, more detail may be required if there is a tract indexing system or a land registration system.

If the debtor does not have an interest of record in the real property, a real-property-related financing statement must show the name of a record owner, and Section 9-519(d) requires the financing statement to be indexed in the name of that owner. This requirement also enables financing statements covering as-extracted collateral or timber to be cut and financing statements filed as fixture filings to fit into the real-property search system.

6. Record of Mortgage Effective as Financing Statement. Subsection (c) explains when a record of a mortgage is effective as a financing statement filed as a fixture filing or to cover timber to be cut or as-extracted collateral. Use of the term “record of a mortgage” recognizes that in some systems the record actually filed is not the record pursuant to which a mortgage is created. Moreover, “mortgage” is defined in Section 9-102 as an “interest in real property,” not as the record that creates or evidences the mortgage or the record that is filed in the public recording systems. A record creating a mortgage may also create a security interest with respect to fixtures (or other goods) in conformity with this Article. A single agreement creating a mortgage on real property and a security

interest in chattels is common and useful for certain purposes. Under subsection (c), the recording of the record evidencing a mortgage (if it satisfies the requirements for a financing statement) constitutes the filing of a financing statement as to the fixtures (but not, of course, as to other goods). Section 9-515(g) makes the usual five-year maximum life for financing statements inapplicable to mortgages that operate as fixture filings under Section 9-502(c). Such mortgages are effective for the duration of the real-property recording.

Of course, if a combined mortgage covers chattels that are not fixtures, a regular financing statement filing is necessary with respect to the chattels, and subsection (c) is inapplicable. Likewise, a financing statement filed as a “fixture filing” is not effective to perfect a security interest in personal property other than fixtures.

In some cases it may be difficult to determine whether goods are or will become fixtures. Nothing in this Part prohibits the filing of a “precautionary” fixture filing, which would provide protection in the event goods are determined to be fixtures. The fact of filing should not be a factor in the determining whether goods are fixtures. Cf. Section 9-505(b).

28-9-503. Name of debtor and secured party. — (a) A financing statement sufficiently provides the name of the debtor:

- (1) Except as otherwise provided in paragraph (3) of this subsection, if the debtor is a registered organization or the collateral is held in a trust that is a registered organization, only if the financing statement provides the name that is stated to be the registered organization’s name on the public organic record most recently filed with or issued or enacted by the registered organization’s jurisdiction of organization which purports to state, amend or restate the registered organization’s name;
- (2) Subject to subsection (f) of this section, if the collateral is being administered by the personal representative of a decedent, only if the financing statement provides, as the name of the debtor, the name of the decedent and, in a separate part of the financing statement, indicates that the collateral is being administered by a personal representative;
- (3) If the collateral is held in a trust that is not a registered organization, only if the financing statement:
 - (A) provides, as the name of the debtor:
 - (i) if the organic record of the trust specifies a name for the trust, the name so specified; or
 - (ii) if the organic record of the trust does not specify a name for the trust, the name of the settlor or testator; and
 - (B) in a separate part of the financing statement:
 - (i) if the name is provided in accordance with subparagraph (A)(i) of this paragraph, indicates that the collateral is held in a trust; or
 - (ii) if the name is provided in accordance with subparagraph (A)(ii) of

this paragraph, provides additional information sufficient to distinguish the trust from other trusts having one (1) or more of the same settlors or the same testator and indicates that the collateral is held in a trust, unless the additional information so indicates;

(4) Subject to subsection (g) of this section, if the debtor is an individual to whom this state has issued a driver's license or an Idaho identification card that has not expired, only if it provides the name of the individual which is indicated on the driver's license or the Idaho identification card;

(5) If the debtor is an individual to whom paragraph (4) of this subsection does not apply, only if it provides the individual name of the debtor or the surname and first personal name of the debtor; and

(6) In other cases:

(A) if the debtor has a name, only if it provides the organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates or other persons comprising the debtor, in a manner that each name provided would be sufficient if the person named were the debtor.

(b) A financing statement that provides the name of the debtor in accordance with subsection (a) of this section is not rendered ineffective by the absence of:

(1) A trade name or other name of the debtor; or

(2) Unless required under subsection (a)(6)(B) of this section, names of partners, members, associates or other persons comprising the debtor.

(c) A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) A financing statement may provide the name of more than one (1) debtor and the name of more than one (1) secured party.

(f) The name of the decedent indicated on the order appointing the personal representative of the decedent issued by the court having jurisdiction over the collateral is sufficient as the "name of the decedent" under subsection (a)(2) of this section.

(g) If this state has issued to an individual more than one (1) driver's license or Idaho identification card of a kind described in subsection (a)(4) of this section, the one that was issued most recently is the one to which subsection (a)(4) of this section refers.

(h) The "name of the settlor or testator" means:

(1) If the settlor is a registered organization, the name of the registered organization indicated on the public organic record filed with or issued or enacted by the registered organization's jurisdiction of organization; or

(2) In other cases, the name of the settlor or testator indicated in the trust's organic record.

History.

I.C., § 28-9-503, as added by 2001, ch. 208,
§ 2, p. 704; am. 2012, ch. 145, § 11, p. 381.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 145, rewrote the section to the extent that a detailed comparison is impracticable.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS

ANALYSIS

Change of name.
Name of debtor.

Change of Name.

Where the creditor failed to update its financing statement after the debtor changed its name, it failed to comply with the requirements of this section and § 28-9-507(c). The priority of its lien was defeated by the trustee in bankruptcy under 11 U.S.C.S. § 544(a)(1). *Gugino v. Wells Fargo Bank Northwest, N.A.* (In re Lifestyle Home Furnishings, LLC), 2010 Bankr. LEXIS 111 (Bankr. D. Idaho Jan. 14, 2010).

Name of Debtor.

Financing statement was seriously misleading since the debtor's full legal name was Wing Foods, Inc., and the statement identified the debtor as Wing Fine Food. Bankr. Estate of Wing Foods, Inc. v. CCF Leasing Co. (In re Wing Foods), 2010 Bankr. LEXIS 114 (Bankr. D. Idaho Jan. 14, 2010).

RESEARCH REFERENCES

A.L.R. — Sufficiency and effectiveness of designation of debtor in financing statement

under Uniform Commercial Code §§ 9-503 and 9-506 (Revised 2000). 28 A.L.R.6th 461.

OFFICIAL COMMENT

1. **Source.** Subsections (a)(4)(A), (b), and (c) derive from former Section 9-402(7); otherwise, new.

2. **Debtor's Name.** The requirement that a financing statement provide the debtor's name is particularly important. Financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name. Subsection (a) explains what the debtor's name is for purposes of a financing statement.

a. **Registered Organizations.** As a general matter, if the debtor is a "registered organization" (defined in Section 9-102 so as to ordinarily include corporations, limited partnerships, limited liability companies, and statutory trusts), then the debtor's name is the name shown on the "public organic record" of the debtor's "jurisdiction of organization" (both also defined in Section 9-102).

b. **Collateral Held in a Trust.** When a financing statement covers collateral that is held in a trust that is a registered organization, subsection (a)(1) governs the name of the debtor. If, however, the collateral is held in a trust that is not a registered organization, subsection (a)(3) applies. (As used in this Article, collateral "held in a trust" includes

collateral as to which the trust is the debtor as well as collateral as to which the trustee is the debtor.) This subsection adopts a convention that generally results in the name of the trust or the name of the trust's settlor being provided as the name of the debtor on the financing statement, even if, as typically is the case with common-law trusts, the "debtor" (defined in Section 9-102) is a trustee acting with respect to the collateral. This convention provides more accurate information and eases the burden for searchers, who otherwise would have difficulty with respect to debtor trustees that are large financial institutions.

More specifically, if a trust's organic record specifies a name for the trust, subsection (a)(3) requires the financing statement to provide, as the name of the debtor, the name for the trust specified in the organic record. In addition, the financing statement must indicate, in a separate part of the financing statement, that the collateral is held in a trust.

If the organic record of the trust does not specify a name for the trust, the name required for the financing statement is the name of the settlor or, in the case of a testamentary trust, the testator, in each case as determined under subsection (h). In addition,

the financing statement must provide sufficient additional information to distinguish the trust from other trusts having one or more of the same settlors or the same testator. In many cases an indication of the date on which the trust was settled will satisfy this requirement. If neither the name nor the additional information indicates that the collateral is held in a trust, the financing statement must indicate that fact, but not as part of the debtor's name.

Neither the indication that the collateral is held in a trust nor the additional information that distinguishes the trust from other trusts having one or more of the same settlors or the same testator is part of the debtor's name. Nevertheless, a financing statement that fails to provide, in a separate part of the financing statement, any required indication or additional information does not sufficiently provide the name of the debtor under Sections 9-502(a) and 9-503(a)(3), does not "substantially satisfy[] the requirements" of Part 5 within the meaning of Section 9-506(a), and so is ineffective.

c. Collateral Administered by a Personal Representative. Subsection (a)(2) deals with collateral that is being administered by an executor, administrator, or other personal representative of a decedent. Even if, as often is the case, the representative is the "debtor" (defined in Section 9-102), the financing statement must provide the name of the decedent as the name of the debtor. Subsection (f) provides a safe harbor, under which the name of the decedent indicated on the order appointing the personal representative issued by the court having jurisdiction over the collateral is sufficient as the name of the decedent. If the order indicates more than one name for the decedent, the first name in the list qualifies under subsection (f); however, other names in the list also may qualify as the "name of the decedent" within the meaning of subsection (a)(2). In addition to providing the name of the decedent, the financing statement must indicate, in a separate part of the financing statement, that the collateral is being administered by a personal representative. Although the indication is not part of the debtor's name, a financing statement that fails to provide the indication does not sufficiently provide the name of the debtor under Sections 9-502(a) and 9-503(a)(2), does not "substantially satisfy[] the requirements" of Part 5 within the meaning of Section 9-506(a), and so is ineffective.

d. Individuals. This Article provides alternative approaches towards the requirement for providing the name of a debtor who is an individual. [*Idaho has adopted Alternative A.*]

Alternative A. Alternative A distinguishes between two groups of individual debtors. For

debtors holding an unexpired driver's license issued by the State where the financing statement is filed (ordinarily the State where the debtor maintains the debtor's principal residence), Alternative A requires that a financing statement provide the name indicated on the license. When a debtor does not hold an unexpired driver's license issued by the relevant State, the requirement can be satisfied in either of two ways. A financing statement is sufficient if it provides the "individual name" of the debtor. Alternatively, a financing statement is sufficient if it provides the debtor's surname (i.e., family name) and first personal name (i.e., first name other than the surname).

Alternative B. Alternative B provides three ways in which a financing statement may sufficiently provide the name of an individual who is a debtor. The "individual name" of the debtor is sufficient, as is the debtor's surname and first personal name. If the individual holds an unexpired driver's license issued by the State where the financing statement is filed (ordinarily the State of the debtor's principal residence), the name indicated on the driver's license also is sufficient.

Name indicated on the driver's license. A financing statement does not "provide the name of the individual which is indicated" on the debtor's driver's license unless the name it provides is the same as the name indicated on the license. This is the case even if the name indicated on the debtor's driver's license contains an error.

Example 1: Debtor, an individual whose principal residence is in Illinois, grants a security interest to SP in certain business equipment. SP files a financing statement with the Illinois filing office. The financing statement provides the name appearing on Debtor's Illinois driver's license, "Joseph Allan Jones." Regardless of which Alternative is in effect in Illinois, this filing would be sufficient under Illinois' Section 9-503(a), even if Debtor's correct middle name is Alan, not Allan.

A filing against "Joseph A. Jones" or "Joseph Jones" would not "provide the name of the individual which is indicated" on the debtor's driver's license. However, these filings might be sufficient if Alternative A is in effect in Illinois and Jones has no current (i.e., unexpired) Illinois driver's license, or if Illinois has enacted Alternative B.

Determining the name that should be provided on the financing statement must not be done mechanically. The order in which the components of an individual's name appear on a driver's license differs among the States. Had the debtor in Example 1 obtained a driver's license from a different State, the license might have indicated the name as "Jones Joseph Allan." Regardless of the order

on the driver's license, the debtor's surname must be provided in the part of the financing statement designated for the surname.

Alternatives A and B both refer to a license issued by "this State." Perfection of a security interest by filing ordinarily is determined by the law of the jurisdiction in which the debtor is located. See Section 9-301(1). (Exceptions to the general rule are found in Section 9-301(3) and (4), concerning fixture filings, timber to be cut, and as-extracted collateral.) A debtor who is an individual ordinarily is located at the individual's principal residence. See Section 9-307(b). (An exception appears in Section 9-307(c).) Thus, a given State's Section 9-503 ordinarily will apply during any period when the debtor's principal residence is located in that State, even if during that time the debtor holds or acquires a driver's license from another State.

When a debtor's principal residence changes, the location of the debtor under Section 9-307 also changes and perfection by filing ordinarily will be governed by the law of the debtor's new location. As a consequence of the application of that jurisdiction's Section 9-316, a security interest that is perfected by filing under the law of the debtor's former location will remain perfected for four months after the relocation, and thereafter if the secured party perfects under the law of the debtor's new location. Likewise, a financing statement filed in the former location may be effective to perfect a security interest that attaches after the debtor relocates. See Section 9-316(h).

Individual name of the debtor. Article 9 does not determine the "individual name" of a debtor. Nor does it determine which element or elements in a debtor's name constitute the surname. In some cases, determining the "individual name" of a debtor may be difficult, as may determining the debtor's surname. This is because in the case of individuals, unlike registered organizations, there is no public organic record to which reference can be made and from which the name and its components can be definitively determined.

Names can take many forms in the United States. For example, whereas a surname is often colloquially referred to as a "last name," the sequence in which the elements of a name are presented is not determinative. In some cultures, the surname appears first, while in others it may appear in a location that is neither first nor last. In addition, some surnames are composed of multiple elements that, taken together, constitute a single surname. These elements may or may not be separated by a space or connected by a hyphen, "i," or "y." In other instances, some or all of the same elements may not be part of the surname. In some cases, a debtor's entire name might be composed of only a single

element, which should be provided in the part of the financing statement designated for the surname.

In disputes as to whether a financing statement sufficiently provides the "individual name" of a debtor, a court should refer to any non-UCC law concerning names. However, case law about names may have developed in contexts that implicate policies different from those of Article 9. A court considering an individual's name for purposes of determining the sufficiency of a financing statement is not necessarily bound by cases that were decided in other contexts and for other purposes.

Individuals are asked to provide their names on official documents such as tax returns and bankruptcy petitions. An individual may provide a particular name on an official document in response to instructions relating to the document rather than because the name is actually the individual's name. Accordingly, a court should not assume that the name an individual provides on an official document necessarily constitutes the "individual name" for purposes of the sufficiency of the debtor's name on a financing statement. Likewise, a court should not assume that the name as presented on an individual's birth certificate is necessarily the individual's current name.

In applying non-UCC law for purposes of determining the sufficiency of a debtor's name on a financing statement, a court should give effect to the instruction in Section 1-103(a)(1) that the UCC "must be liberally construed and applied to promote its underlying purposes and policies," which include simplifying and clarifying the law governing commercial transactions. Thus, determination of a debtor's name in the context of the Article 9 filing system must take into account the needs of both filers and searchers. Filers need a simple and predictable system in which they can have a reasonable degree of confidence that, without undue burden, they can determine a name that will be sufficient so as to permit their financing statements to be effective. Likewise, searchers need a simple and predictable system in which they can have a reasonable degree of confidence that, without undue burden, they will discover all financing statements pertaining to the debtor in question. The court also should take into account the purpose of the UCC to make the law uniform among the various jurisdictions. See Section 1-103(a)(3).

Of course, once an individual debtor's name has been determined to be sufficient for purposes of Section 9-503, a financing statement that provides a variation of that name, such as a "nickname" that does not constitute the debtor's name, does not sufficiently provide the name of the debtor under this section. Cf. Section 9-503(c) (a financing statement pro-

viding only a debtor's trade name is not sufficient).

If there is any doubt about an individual debtor's name, a secured party may choose to file one or more financing statements that provide a number of possible names for the debtor and a searcher may similarly choose to search under a number of possible names.

Note that, even if the name provided in an initial financing statement is correct, the filing office nevertheless must reject the financing statement if it does not identify an individual debtor's surname (e.g., if it is not clear whether the debtor's surname is Perry or Mason). See Section 9-516(b)(3)(C).

3. Secured Party's Name. New subsection (d) makes clear that when the secured party is a representative, a financing statement is sufficient if it names the secured party, whether or not it indicates any representative capacity. Similarly, a financing statement that names a representative of the secured party is sufficient, even if it does not indicate the representative capacity.

Example 2: Debtor creates a security in-

terest in favor of Bank X, Bank Y, and Bank Z, but not to their representative, the collateral agent (Bank A). The collateral agent is not itself a secured party. See Section 9-102. Under Sections 9-502(a) and 9-503(d), however, a financing statement is effective if it names as secured party Bank A and not the actual secured parties, even if it omits Bank A's representative capacity.

Each person whose name is provided in an initial financing statement as the name of the secured party or representative of the secured party is a secured party of record. See Section 9-511.

4. Multiple Names. Subsection (e) makes explicit what is implicit under former Article 9: a financing statement may provide the name of more than one debtor and secured party. See Section 1-106 (words in the singular include the plural). With respect to records relating to more than one debtor, see Section 9-520(d). With respect to financing statements providing the name of more than one secured party, see Sections 9-509(e) and 9-510(b).

28-9-504. Indication of collateral. — A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

(1) A description of the collateral pursuant to section 28-9-108[, Idaho Code]; or

(2) An indication that the financing statement covers all assets or all personal property.

History.

I.C., § 28-9-504, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-504, which comprised 1967, ch. 161, § 9-504, p. 351, was repealed by S.L. 2001, ch. 208, § 2, p. 704.

Compiler's Notes.

The bracketed insertion in subsection (1) was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. Source. Former Section 9-402(1).

2. Indication of Collateral. To comply with Section 9-502(a), a financing statement must "indicate" the collateral it covers. A financing statement sufficiently indicates collateral claimed to be covered by the financing statement if it satisfies the purpose of conditioning perfection on the filing of a financing statement, i.e., if it provides notice that a person may have a security interest in the collateral claimed. See Section 9-502, Comment 2. In particular, an indication of collateral that would have satisfied the require-

ments of former Section 9-402(1) (i.e., "a statement indicating the types, or describing the items, of collateral") suffices under Section 9-502(a). An indication may satisfy the requirements of Section 9-502(a), even if it would not have satisfied the requirements of former Section 9-402(1).

This section provides two safe harbors. Under paragraph (1), a "description" of the collateral (as the term is explained in Section 9-108) suffices as an indication for purposes of the sufficiency of a financing statement.

Debtors sometimes create a security inter-

est in all, or substantially all, of their assets. To accommodate this practice, paragraph (2) expands the class of sufficient collateral references to embrace “an indication that the financing statement covers all assets or all personal property.” If the property in question belongs to the debtor and is personal property, any searcher will know that the property is covered by the financing statement. Of course, regardless of its breadth, a financing statement has no effect with respect to prop-

erty indicated but to which a security interest has not attached. Note that a broad statement of this kind (e.g., “all debtor’s personal property”) would not be a sufficient “description” for purposes of a security agreement. See Sections 9-203(b)(3)(A), 9-108. It follows that a somewhat narrower description than “all assets,” e.g., “all assets other than automobiles,” is sufficient for purposes of this section, even if it does not suffice for purposes of a security agreement.

28-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.

— (a) A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in section 28-9-311(a)[, Idaho Code], using the terms “consignor,” “consignee,” “lessor,” “lessee,” “bailor,” “bailee,” “licensor,” “licensee,” “owner,” “registered owner,” “buyer,” “seller,” or words of similar import, instead of the terms “secured party” and “debtor.”

(b) This part applies to the filing of a financing statement under subsection (a) of this section and, as appropriate, to compliance that is equivalent to filing a financing statement under section 28-9-311(b)[, Idaho Code], but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, licensor, owner or buyer which attaches to the collateral is perfected by the filing or compliance.

History.

I.C., § 28-9-505, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-505, which comprised 1967, ch. 161, § 9-505, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Compiler’s Notes.

The bracketed insertions in subsections (a) and (b) were added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

1. **Source.** Former Section 9-408.

2. **Precautionary Filing.** Occasionally, doubts arise concerning whether a transaction creates a relationship to which this Article or its filing provisions apply. For example, questions may arise over whether a “lease” of equipment in fact creates a security interest or whether the “sale” of payment intangibles in fact secures an obligation, thereby requiring action to perfect the security interest. This section, which derives from former Section 9-408, affords the option of filing of a financing statement with appropriate changes of terminology but without affecting

the substantive question of classification of the transaction.

3. **Changes from Former Section 9-408.** This section expands the rule of former Section 9-408 to embrace more generally other bailments and transactions, as well as sales transactions, primarily sales of payment intangibles and promissory notes. It provides the same benefits for compliance with a statute or treaty described in Section 9-311(a) that former Section 9-408 provided for filing, in connection with the use of terms such as “lessor,” “consignor,” etc. The references to “owner” and “registered owner” are intended

to address, for example, the situation where a putative lessor is the registered owner of an automobile covered by a certificate of title and the transaction is determined to create a security interest. Although this section provides that the security interest is perfected, the relevant certificate-of-title statute may expressly provide to the contrary or may be ambiguous. If so, it may be necessary or advisable to amend the certificate-of-title statute to ensure that perfection of the security interest will be achieved.

As did former Section 1-201, former Article 9 referred to transactions, including leases and consignments, “intended as security.” This misleading phrase created the erroneous impression that the parties to a transaction can dictate how the law will classify it (e.g., as a bailment or as a security interest) and thus affect the rights of third parties. This Article deletes the phrase wherever it appears. Sub-

section (b) expresses the principle more precisely by referring to a security interest that “secures an obligation.”

4. **Consignments.** Although a “true” consignment is a bailment, the filing and priority provisions of former Article 9 applied to “true” consignments. See former Sections 2-326(3), 9-114. A consignment “intended as security” created a security interest that was in all respects subject to former Article 9. This Article subsumes most true consignments under the rubric of “security interest.” See Sections 9-102 (definition of “consignment”), 9-109(a)(4), 1-201(b)(35) (definition of “security interest”). Nevertheless, it maintains the distinction between a (true) “consignment,” as to which only certain aspects of Article 9 apply, and a so-called consignment that actually “secures an obligation,” to which Article 9 applies in full. The revisions to this section reflect the change in terminology.

28-9-506. Effect of errors or omissions. — (a) A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) Except as otherwise provided in subsection (c) of this section, a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 28-9-503(a)[, Idaho Code,] is seriously misleading.

(c) If a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 28-9-503(a)[, Idaho Code], the name provided does not make the financing statement seriously misleading.

(d) For purposes of section 28-9-508(b)[, Idaho Code], the “debtor’s correct name” in subsection (c) of this section means the correct name of the new debtor.

History.

I.C., § 28-9-506, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Prior Laws.

Former § 28-9-506, which comprised 1967, ch. 161, § 9-506, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Compiler’s Notes.

The bracketed insertions in subsections (b), (c), and (d) were added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

Debtor’s Name.

Financing statement failed to sufficiently provide the name of the debtor, since the debtor’s full legal name was Wing Foods, Inc., and the statement identified the debtor as

Wing Fine Food. Bankr. Estate of Wing Foods, Inc. v. CCF Leasing Co. (In re Wing Foods), 2010 Bankr. LEXIS 114 (Bankr. D. Idaho Jan. 14, 2010).

RESEARCH REFERENCES

A.L.R. — Sufficiency and effectiveness of designation of debtor in financing statement under Uniform Commercial Code §§ 9-503 and 9-506 (Revised 2000). 28 A.L.R.6th 461.

OFFICIAL COMMENT

1. **Source.** Former Section 9-402(8).
 2. **Errors and Omissions.** Like former Section 9-402(8), subsection (a) is in line with the policy of this Article to simplify formal requisites and filing requirements. It is designed to discourage the fanatical and impossibly refined reading of statutory requirements in which courts occasionally have indulged themselves. Subsection (a) provides the standard applicable to indications of collateral. Subsections (b) and (c), which are new, concern the effectiveness of financing statements in which the debtor's name is incorrect. Subsection (b) contains the general rule: a financing statement that fails sufficiently to provide the debtor's name in accordance with Section 9-503(a) is seriously misleading as a matter of law. Subsection (c) provides an exception: If the financing statement nevertheless would be discovered in a search under the debtor's correct name, using the filing office's standard search logic, if any, then as a matter of law the incorrect name does not make the financing statement seriously misleading. A financing statement that is seriously misleading under this section is ineffective even if it is disclosed by (i) using a search logic other than that of the filing office to search the official records, or (ii) using the filing office's standard search logic to search a data base other than that of the filing office. For purposes of subsection (c), any name that satisfies Section 9-503(a) at the time of the search is a "correct name."

This section and Section 9-503 balance the interests of filers and searchers. Searchers are not expected to ascertain nicknames, trade names, and the like by which the debtor may be known and then search under each of them. Rather, it is the secured party's responsibility to provide the name of the debtor sufficiently in a filed financing statement. Subsection (c) sets forth the only situation in which a financing statement that fails sufficiently to provide the name of the debtor is not seriously misleading. As stated in subsection (b), if the name of the debtor provided on a financing statement is insufficient and sub-

section (c) is not satisfied, the financing statement is seriously misleading. Such a financing statement is ineffective even if the debtor is known in some contexts by the name provided on the financing statement and even if searchers know or have reason to know that the name provided on the financing statement refers to the debtor. Any suggestion to the contrary in a judicial opinion is incorrect.

To satisfy the requirements of Section 9-503(a)(2), a financing statement must indicate that the collateral is being administered by a personal representative. To satisfy the requirements of Section 9-503(a)(3), a financing statement must indicate that the collateral is held in a trust and provide additional information that distinguishes the trust from certain other trusts. The indications and additional information are not part of the debtor's name. Nevertheless, a financing statement that fails to provide an indication or the additional information when required does not sufficiently provide the name of the debtor under Sections 9-502(a) and 9-503(a), does not "substantially satisfy[] the requirements" of Part 5 within the meaning of this section and so is ineffective.

In addition to requiring the debtor's name and an indication of the collateral, Section 9-502(a) requires a financing statement to provide the name of the secured party or a representative of the secured party. Inasmuch as searches are not conducted under the secured party's name, and no filing is needed to continue the perfected status of security interest after it is assigned, an error in the name of the secured party or its representative will not be seriously misleading. However, in an appropriate case, an error of this kind may give rise to an estoppel in favor of a particular holder of a conflicting claim to the collateral. See Section 1-103.

3. **New Debtors.** Subsection (d) provides that, in determining the extent to which a financing statement naming an original debtor is effective against a new debtor, the sufficiency of the financing statement should be tested against the name of the new debtor.

28-9-507. Effect of certain events on effectiveness of financing statement. — (a) A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

(b) Except as otherwise provided in subsection (c) of this section and section 28-9-508, Idaho Code, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under section 28-9-506, Idaho Code.

(c) If the name that a filed financing statement provides for a debtor becomes insufficient as the name of the debtor under section 28-9-503(a), Idaho Code, so that the financing statement becomes seriously misleading under section 28-9-506, Idaho Code:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four (4) months after, the filed financing statement becomes seriously misleading; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four (4) months after the filed financing statement becomes seriously misleading, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four (4) months after that event.

History.

I.C., § 28-9-507, as added by 2001, ch. 208, § 2, p. 704; am. 2012, ch. 145, § 12, p. 381.

STATUTORY NOTES

Prior Laws.

Former § 28-9-507, which comprised 1967, ch. 161, § 9-507, p. 351, was repealed by S.L. 2001, ch. 208, § 1.

Amendments.

The 2012 amendment, by ch. 145, in subsection (c), rewrote the introductory paragraph which read: "If a debtor so changes its name that a filed financing statement be-

comes seriously misleading under section 28-9-506" and substituted "filed financing statement becomes seriously misleading" for "change" in paragraphs (1) and (2).

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS

Change of Name.

Where the creditor failed to update its financing statement after the debtor changed its name, it failed to comply with the requirements of § 28-9-503(a)(1) and this section. The priority of its lien was defeated by the

trustee in bankruptcy under 11 U.S.C.S. § 544(a)(1). *Gugino v. Wells Fargo Bank Northwest, N.A.* (In re Lifestyle Home Furnishings, LLC), 2010 Bankr. LEXIS 111 (Bankr. D. Idaho Jan. 14, 2010).

OFFICIAL COMMENT

1. **Source.** Former Section 9-402(7).

2. **Scope of Section.** This section deals with situations in which the information in a proper financing statement becomes inaccurate after the financing statement is filed. Compare Section 9-338, which deals with situations in which a financing statement contains a particular kind of information concerning the debtor (i.e., the information described in Section 9-516(b)(5)) that is incorrect at the time it is filed.

3. **Post-Filing Disposition of Collateral.** Under subsection (a), a financing statement remains effective even if the collateral is sold or otherwise disposed of. This subsection clarifies the third sentence of former Section 9-402(7) by providing that a financing statement remains effective following the disposition of collateral only when the security interest or agricultural lien continues in that collateral. This result is consistent with the conclusion of PEB Commentary No. 3. Nor-

mally, a security interest does continue after disposition of the collateral. See Section 9-315(a). Law other than this Article determines whether an agricultural lien survives disposition of the collateral.

As a consequence of the disposition, the collateral may be owned by a person other than the debtor against whom the financing statement was filed. Under subsection (a), the secured party remains perfected even if it does not correct the public record. For this reason, any person seeking to determine whether a debtor owns collateral free of security interests must inquire as to the debtor's source of title and, if circumstances seem to require it, search in the name of a former owner. Subsection (a) addresses only the sufficiency of the information contained in the financing statement. A disposition of collateral may result in loss of perfection for other reasons. See Section 9-316.

Example: Dee Corp. is an Illinois corporation. It creates a security interest in its equipment in favor of Secured Party. Secured Party files a proper financing statement in Illinois. Dee Corp. sells an item of equipment to Bee Corp., a Pennsylvania corporation, subject to the security interest. The security interest continues, see Section 9-315(a), and remains perfected, see Section 9-507(a), notwithstanding that the financing statement is filed under "D" (for Dee Corp.) and not under "B." However, because Bee Corp. is located in Pennsylvania and not Illinois, see Section 9-307, unless Secured Party perfects under Pennsylvania law within one year after the transfer, its security interest will become unperfected and will be deemed to have been unperfected against purchasers of the collateral. See Section 9-316.

4. Other Post-Filing Changes. Subsection (b) provides that, as a general matter, post-filing changes that render a financing statement seriously misleading have no effect on a financing statement. The financing statement remains effective. It is subject to two exceptions: Section 9-508 and Section 9-507(c). Section 9-508 addresses the effectiveness of a financing statement filed against an original debtor when a new debtor becomes bound by the original debtor's security agreement. It is discussed in the Comments to that section. Section 9-507(c) addresses cases in which a filed financing statement provides a name that, at the time of filing, satisfies the requirements of Section 9-503(a) with respect to the named debtor but, at a later time, no longer does so.

Example 1: Debtor, an individual whose principal residence is in California, grants a security interest to SP in certain business equipment. SP files a financing statement with the California filing office. Alternative A is in effect in California. The financing state-

ment provides the name appearing on Debtor's California driver's license, "James McGinty." Debtor obtains a court order changing his name to "Roger McGuinn" but does not change his driver's license. Even after the court order issues, the name provided for the debtor in the financing statement is sufficient under Section 9-503(a). Accordingly, Section 9-507(c) does not apply.

The same result would follow if Alternative B is in effect in California.

Under Section 9-503(a)(4) (Alternative A), if the debtor holds a current (i.e., unexpired) driver's license issued by the State where the financing statement is filed, the name required for the financing statement is the name indicated on the license that was issued most recently by that State. If the debtor does not have a current driver's license issued by that State, then the debtor's name is determined under subsection (a)(5). It follows that a debtor's name may change, and a financing statement providing the name on the debtor's then-current driver's license may become seriously misleading, if the license expires and the debtor's name under subsection (a)(5) is different. The same consequences may follow if a debtor's driver's license is renewed and the names on the licenses differ.

Example 2: The facts are as in Example 1. Debtor's driver's license expires one year after the entry of the court order changing Debtor's name. Debtor does not renew the license. Upon expiration of the license, the name required for sufficiency by Section 9-503(a) is the individual name of the debtor or the debtor's surname and first personal name. The name "James McGinty" has become insufficient.

Example 3: The facts are as in Example 1. Before the license expires, Debtor renews the license. The name indicated on the new license is "Roger McGuinn." Upon issuance of the new license, "James McGinty" becomes insufficient as the debtor's name under Section 9-503(a).

The same results would follow if Alternative B is in effect in California (assuming that, following the issuance of the court order, "James McGinty" is neither the individual name of the debtor nor the debtor's surname and first personal name).

Even if the name provided as the name of the debtor becomes insufficient under Section 9-503(a), the filed financing statement does not become seriously misleading, and Section 9-507(c) does not apply, if the financing statement can be found by searching under the debtor's "correct" name, using the filing office's standard search logic. See Section 9-506. Any name that satisfies Section 9-503(a) at the time of the search is a "correct name" for these purposes. Thus, assuming that a search of the records of the California filing office

under “Roger McGuinn,” using the filing of office’s standard search logic, would not disclose a financing statement naming “James McGinty,” the financing statement in Examples 2 and 3 has become seriously misleading and Section 9-507(c) applies.

If a filed financing statement becomes seriously misleading because the name it provides for a debtor becomes insufficient, the financing statement, unless amended to provide a sufficient name for the debtor, is effective only to perfect a security interest in collateral acquired by the debtor before, or

within four months after, the change. If an amendment that provides a sufficient name is filed within four months after the change, the financing statement as amended would be effective also with respect to collateral acquired more than four months after the change. If an amendment that provides a sufficient name is filed more than four months after the change, the financing statement as amended would be effective also with respect to collateral acquired more than four months after the change, but only from the time of the filing of the amendment.

28-9-508. Effectiveness of financing statement if new debtor becomes bound by security agreement. — (a) Except as otherwise provided in this section, a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral.

(b) If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (a) of this section to be seriously misleading under section 28-9-506[, Idaho Code]:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four (4) months after, the new debtor becomes bound under section 28-9-203(d)[, Idaho Code]; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four (4) months after the new debtor becomes bound under section 28-9-203(d)[, Idaho Code,] unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

(c) This section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under section 28-9-507(a)[, Idaho Code].

History.

I.C., § 28-9-508, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler’s Notes.

The bracketed insertions in subsections (b) and (c) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. The Problem. Section 9-203(d) and (e) and this section deal with situations where one party (the “new debtor”) becomes bound as debtor by a security agreement entered

into by another person (the “original debtor”). These situations often arise as a consequence of changes in business structure. For example, the original debtor may be an individual debtor who operates a business as a sole

proprietorship and then incorporates it. Or, the original debtor may be a corporation that is merged into another corporation. Under both former Article 9 and this Article, collateral that is transferred in the course of the incorporation or merger normally would remain subject to a perfected security interest. See Sections 9-315(a), 9-507(a). Former Article 9 was less clear with respect to whether an after-acquired property clause in a security agreement signed by the original debtor would be effective to create a security interest in property acquired by the new corporation or the merger survivor and, if so, whether a financing statement filed against the original debtor would be effective to perfect the security interest. This section and Sections 9-203(d) and (e) are a clarification.

3. How New Debtor Becomes Bound. Normally, a security interest is unenforceable unless the debtor has authenticated a security agreement describing the collateral. See Section 9-203(b). New Section 9-203(e) creates an exception, under which a security agreement entered into by one person is effective with respect to the property of another. This exception comes into play if a “new debtor” becomes bound as debtor by a security agreement entered into by another person (the “original debtor”). (The quoted terms are defined in Section 9-102.) If a new debtor does become bound, then the security agreement entered into by the original debtor satisfies the security-agreement requirement of Section 9-203(b)(3) as to existing or after-acquired property of the new debtor to the extent the property is described in the security agreement. In that case, no other agreement is necessary to make a security interest enforceable in that property. See Section 9-203(e).

Section 9-203(d) explains when a new debtor becomes bound by an original debtor’s security agreement. Under Section 9-203(d)(1), a new debtor becomes bound as debtor if, by contract or operation of other law, the security agreement becomes effective to create a security interest in the new debtor’s property. For example, if the applicable corporate law of mergers provides that when A Corp merges into B Corp, B Corp becomes a debtor under A Corp’s security agreement, then B Corp would become bound as debtor following such a merger. Similarly, B Corp would become bound as debtor if B Corp contractually assumes A’s obligations under the security agreement.

Under certain circumstances, a new debtor becomes bound for purposes of this Article even though it would not be bound under other law. Under Section 9-203(d)(2), a new debtor becomes bound when, by contract or

operation of other law, it (i) becomes obligated not only for the secured obligation but also generally for the obligations of the original debtor and (ii) acquires or succeeds to substantially all the assets of the original debtor. For example, some corporate laws provide that, when two corporations merge, the surviving corporation succeeds to the assets of its merger partner and “has all liabilities” of both corporations. In the case where, for example, A Corp merges into B Corp (and A Corp ceases to exist), some people have questioned whether A Corp’s grant of a security interest in its existing and after-acquired property becomes a “liability” of B Corp, such that B Corp’s existing and after-acquired property becomes subject to a security interest in favor of A Corp’s lender. Even if corporate law were to give a negative answer, under Section 9-203(d)(2), B Corp would become bound for purposes of Section 9-203(e) and this section. The “substantially all of the assets” requirement of Section 9-203(d)(2) excludes sureties and other secondary obligors as well as persons who become obligated through veil piercing and other non-successorship doctrines. In most cases, it will exclude successors to the assets and liabilities of a division of a debtor.

4. When Financing Statement Effective Against New Debtor. Subsection (a) provides that a filing against the original debtor generally is effective to perfect a security interest in collateral that a new debtor has at the time it becomes bound by the original debtor’s security agreement and collateral that it acquires after the new debtor becomes bound. Under subsection (b), however, if the filing against the original debtor is seriously misleading as to the new debtor’s name, the filing is effective as to collateral acquired by the new debtor more than four months after the new debtor becomes bound only if a person files during the four-month period an initial financing statement providing the name of the new debtor. Compare Section 9-507(c) (four-month period of effectiveness with respect to collateral acquired by a debtor after the name provided for the debtor becomes insufficient as the name of the debtor). As to the meaning of “initial financing statement” in this context, see Section 9-512, Comment 5.

5. Transferred Collateral. This section does not apply to collateral transferred by the original debtor to a new debtor. See subsection (c). Under those circumstances, the filing against the original debtor continues to be effective until it lapses or perfection is lost for another reason. See Sections 9-316, 9-507(a).

6. Priority. Section 9-326 governs the priority contest between a secured creditor of the original debtor and a secured creditor of the new debtor.

28-9-509. Persons entitled to file a record. — (a) A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

- (1) The debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c) of this section; or
- (2) The person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

(b) By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

- (1) The collateral described in the security agreement; and
- (2) Property that becomes collateral under section 28-9-315(a)(2)[, Idaho Code], whether or not the security agreement expressly covers proceeds.

(c) By acquiring collateral in which a security interest or agricultural lien continues under section 28-9-315(a)(1)[, Idaho Code], a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under section 28-9-315(a)(2)[, Idaho Code].

(d) A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

- (1) The secured party of record authorizes the filing; or
- (2) The amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by section 28-9-513(a) or (c)[, Idaho Code], the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed.

(e) If there is more than one (1) secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under subsection (d) of this section.

History.

I.C., § 28-9-509, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (b), (c), and (d) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New

2. Scope and Approach of This Section. This section collects in one place most of the rules determining whether a record may be filed. Section 9-510 explains the extent to which a filed record is effective. Under these

sections, the identity of the person who effects a filing is immaterial. The filing scheme contemplated by this Part does not contemplate that the identity of a "filer" will be a part of the searchable records. This is consistent with, and a necessary aspect of, eliminating

signatures or other evidence of authorization from the system. (Note that the 1972 amendments to this Article eliminated the requirement that a financing statement contain the signature of the secured party.) As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is insignificant whether the secured party or another person files any given record. The question of authorization is one for the court, not the filing office. However, a filing office may choose to employ authentication procedures in connection with electronic communications, e.g., to verify the identity of a filer who seeks to charge the filing fee.

3. **Unauthorized Filings.** Records filed in the filing office do not require signatures for their effectiveness. Subsection (a)(1) substitutes for the debtor's signature on a financing statement the requirement that the debtor authorize in an authenticated record the filing of an initial financing statement or an amendment that adds collateral. Also, under subsection (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment. A person who files an unauthorized record in violation of subsection (a)(1) is liable under Section 9-625(b) and (e) for actual and statutory damages. Of course, a filed financing statement is ineffective to perfect a security interest if the filing is not authorized. See Section 9-510(a). Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this section. See Sections 1-103, 9-502, Comment 3. This Article applies to other issues, such as the priority of a security interest perfected by the filing of a financing statement. See Section 9-322, Comment 4.

4. ***Ipsa Facto* Authorization.** Under subsection (b), the authentication of a security agreement *ipso facto* constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization. Similarly, a new debtor's becoming bound by a security agreement *ipso facto* constitutes the new debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement by which the new debtor has become bound. And, under subsection (c), the acquisition of collateral in which a security interest continues after disposition under Section 9-315(a)(1) *ipso facto* constitutes an authorization to file an initial financing statement against the person who acquired the collateral. The authorization to file an initial financing statement also constitutes an authorization to file a record covering actual proceeds of the original collateral, even

if the security agreement is silent as to proceeds.

Example 1: Debtor authenticates a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory and accounts. The financing statement is authorized insofar as it covers inventory and unauthorized insofar as it covers accounts. (Note, however, that the financing statement will be effective to perfect a security interest in accounts constituting proceeds of the inventory to the same extent as a financing statement covering only inventory.)

Example 2: Debtor authenticates a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory. Debtor sells some inventory, deposits the buyer's payment into a deposit account, and withdraws the funds to purchase equipment. As long as the equipment can be traced to the inventory, the security interest continues in the equipment. See Section 9-315(a)(2). However, because the equipment was acquired with cash proceeds, the financing statement becomes ineffective to perfect the security interest in the equipment on the 21st day after the security interest attaches to the equipment unless Secured Party continues perfection beyond the 20-day period by filing a financing statement against the equipment or amending the filed financing statement to cover equipment. See Section 9-315(d). Debtor's authentication of the security agreement authorizes the filing of an initial financing statement or amendment covering the equipment, which is "property that becomes collateral under Section 9-315(a)(2)." See Section 9-509(b)(2).

5. **Agricultural Liens.** Under subsection (a)(2), the holder of an agricultural lien may file a financing statement covering collateral subject to the lien without obtaining the debtor's authorization. Because the lien arises as matter of law, the debtor's consent is not required. A person who files an unauthorized record in violation of this subsection is liable under Section 9-625(e) for a statutory penalty and damages.

6. **Amendments; Termination Statements Authorized by Debtor.** Most amendments may not be filed unless the secured party of record, as determined under Section 9-511, authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization of the secured party of record is not required for the filing of a termination statement if the secured party of record failed to send or file a termination statement as required by Section 9-513, the debtor authorizes it to be filed, and the termination statement so indicates. An authorization to file a

record under subsection (d) is effective even if the authorization is not in an authenticated record. Compare subsection (a)(1). However, both the person filing the record and the person giving the authorization may wish to obtain and retain a record indicating that the filing was authorized.

7. Multiple Secured Parties of Record. Subsection (e) deals with multiple secured parties of record. It permits each secured party of record to authorize the filing of amendments. However, Section 9-510(b) pro-

tests the rights and powers of one secured party of record from the effects of filings made by another secured party of record. See Section 9-510, Comment 3.

8. Successor to Secured Party of Record. A person may succeed to the powers of the secured party of record by operation of other law, e.g., the law of corporate mergers. In that case, the successor has the power to authorize filings within the meaning of this section.

28-9-510. Effectiveness of filed record. — (a) A filed record is effective only to the extent that it was filed by a person that may file it under section 28-9-509[, Idaho Code].

(b) A record authorized by one (1) secured party of record does not affect the financing statement with respect to another secured party of record.

(c) A continuation statement that is not filed within the six (6) month period prescribed by section 28-9-515(d)[, Idaho Code,] is ineffective.

History.

I.C., § 28-9-510, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (a) and (c) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. Ineffectiveness of Unauthorized or Overbroad Filings. Subsection (a) provides that a filed financing statement is effective only to the extent it was filed by a person entitled to file it.

Example 1: Debtor authorizes the filing of a financing statement covering inventory. Under Section 9-509, the secured party may file a financing statement covering only inventory; it may not file a financing statement covering other collateral. The secured party files a financing statement covering inventory and equipment. This section provides that the financing statement is effective only to the extent the secured party may file it. Thus, the financing statement is effective to perfect a security interest in inventory but ineffective to perfect a security interest in equipment.

3. Multiple Secured Parties of Record. Section 9-509(e) permits any secured party of record to authorize the filing of most amendments. Subsection (b) of this section prevents a filing authorized by one secured party of record from affecting the rights and powers of another secured party of record without the latter's consent.

Example 2: Debtor creates a security interest in favor of A and B. The filed financing statement names A and B as the secured parties. An amendment deleting some collateral covered by the financing statement is filed pursuant to B's authorization. Although B's security interest in the deleted collateral becomes unperfected, A's security interest remains perfected in all the collateral.

Example 3: Debtor creates a security interest in favor of A and B. The financing statement names A and B as the secured parties. A termination statement is filed pursuant to B's authorization. Although the effectiveness of the financing statement terminates with respect to B's security interest, A's rights are unaffected. That is, the financing statement continues to be effective to perfect A's security interest.

4. Continuation Statements. A continuation statement may be filed only within the six months immediately before lapse. See Section 9-515(d). The filing office is obligated to reject a continuation statement that is filed outside the six-month period. See Sections 9-520(a), 9-516(b)(7). Subsection (c) provides

that if the filing office fails to reject a continuation statement that is not filed in a timely

manner, the continuation statement is ineffective nevertheless.

28-9-511. Secured party of record. — (a) A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under section 28-9-514(a)[, Idaho Code], the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.

(b) If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under section 28-9-514(b)[, Idaho Code], the assignee named in the amendment is a secured party of record.

(c) A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person.

History.

I.C., § 28-9-511, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (a) and (b) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. Secured Party of Record. This new section explains how the secured party of record is to be determined. If SP-1 is named as the secured party in an initial financing statement, it is the secured party of record. Similarly, if an initial financing statement reflects a total assignment from SP-0 to SP-1, then SP-1 is the secured party of record. See subsection (a). If, subsequently, an amendment is filed assigning SP-1's status to SP-2, then SP-2 becomes the secured party of record in place of SP-1. The same result obtains if a subsequent amendment deletes the reference to SP-1 and substitutes therefor a reference to SP-2. If, however, a subsequent amendment adds SP-2 as a secured party but does not purport to remove SP-1 as a secured party, then SP-2 and SP-1 each is a secured party of record. See subsection (b). An amendment purporting to remove the only secured party

of record without providing a successor is ineffective. See Section 9-512(e). At any point in time, all effective records that comprise a financing statement must be examined to determine the person or persons that have the status of secured party of record.

3. Successor to Secured Party of Record. Application of other law may result in a person succeeding to the powers of a secured party of record. For example, if the secured party of record (A) merges into another corporation (B) and the other corporation (B) survives, other law may provide that B has all of A's powers. In that case, B is authorized to take all actions under this Part that A would have been authorized to take. Similarly, acts taken by a person who is authorized under generally applicable principles of agency to act on behalf of the secured party of record are effective under this Part.

28-9-512. Amendment of financing statement. — (a) Subject to section 28-9-509[, Idaho Code], a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection (e) of

this section, otherwise amend the information provided in, a financing statement by filing an amendment that:

- (1) Identifies, by its file number, the initial financing statement to which the amendment relates; and
 - (2) If the amendment relates to an initial financing statement filed or recorded in a filing office described in section 28-9-501(a)(1)[, Idaho Code], provides the information specified in section 28-9-502(b)[, Idaho Code].
- (b) Except as otherwise provided in section 28-9-515[, Idaho Code], the filing of an amendment does not extend the period of effectiveness of the financing statement.
- (c) A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.
- (d) A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.
- (e) An amendment is ineffective to the extent it:
- (1) Purports to delete all debtors and fails to provide the name of a debtor to be covered by the financing statement; or
 - (2) Purports to delete all secured parties of record and fails to provide the name of a new secured party of record.

History.

I.C., § 28-9-512, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (a) and (b) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. Former 9-402(4).

2. Changes to Financing Statements. This section addresses changes to financing statements, including addition and deletion of collateral. Although termination statements, assignments, and continuation statements are types of amendment, this Article follows former Article 9 and contains separate sections containing additional provisions applicable to particular types of amendments. See Section 9-513 (termination statements); 9-514 (assignments); 9-515 (continuation statements). One should not infer from this separate treatment that this Article requires a separate amendment to accomplish each change. Rather, a single amendment would be legally sufficient to, e.g., add collateral and continue the effectiveness of the financing statement.

3. Amendments. An amendment under this Article may identify only the information

contained in a financing statement that is to be changed; alternatively, it may take the form of an amended and restated financing statement. The latter would state, for example, that the financing statement "is amended and restated to read as follows: . . ." References in this Part to an "amended financing statement" are to a financing statement as amended by an amendment using either technique.

This section revises former Section 9-402(4) to permit secured parties of record to make changes in the public record without the need to obtain the debtor's signature. However, the filing of an amendment that adds collateral or adds a debtor must be authorized by the debtor or it will not be effective. See Sections 9-509(a), 9-510(a).

4. Amendment Adding Debtor. An amendment that adds a debtor is effective, provided that the added debtor authorizes the

filing. See Section 9-509(a). However, filing an amendment adding a debtor to a previously filed financing statement affords no advantage over filing an initial financing statement against that debtor and may be disadvantageous. With respect to the added debtor, for purposes of determining the priority of the security interest, the time of filing is the time of the filing of the amendment, not the time of the filing of the initial financing statement. See subsection (d). However, the effectiveness of the financing statement lapses with respect to added debtor at the time it lapses with respect to the original debtor. See subsection (b).

5. Amendment Adding Debtor Name.

Many states have enacted statutes governing the “conversion” of one organization organized under the law of that state, e.g., a corporation, into another such organization, e.g., a limited liability company. This Article defers to those statutes to determine whether the resulting organization is the same legal person as the initial, converting organization (albeit with a different name) or whether the resulting organization is a different legal person. When the governing statute does not clearly resolve the question, a secured party whose debtor is the converting organization may wish to proceed as if the statute provides for both results. In these circumstances, an amendment adding to the initial financing statement the name of the resulting organization may be preferable to an amendment substituting that name for the name of the debtor provided on the initial financing statement. In the event the governing statute is construed as providing that the resulting organization is the same legal person as the

converting organization, but with a different name, the timely filing of such an amendment would satisfy the requirement of Section 9-507(c)(2). If, however, the governing statute is construed as providing that the resulting organization is a different legal person, the financing statement (which continues to provide the name of the original debtor) would be effective as to collateral acquired by the resulting organization (“new debtor”) before, and within four months after, the conversion. See Section 9-508(b)(1). Inasmuch as it is the first financing statement filed against the resulting organization by the secured party, the record adding the name of the resulting organization as a debtor would constitute “an initial financing statement providing the name of the new debtor” under Section 9-508(b)(2). The secured party also may wish to file another financing statement naming the resulting organization as debtor. See Comment 4.

6. Deletion of All Debtors or Secured Parties of Record. Subsection (e) assures that there will be a debtor and secured party of record for every financing statement.

Example: A filed financing statement names A and B as secured parties of record and covers inventory and equipment. An amendment deletes equipment and purports to delete A and B as secured parties of record without adding a substitute secured party. The amendment is ineffective to the extent it purports to delete the secured parties of record but effective with respect to the deletion of collateral. As a consequence, the financing statement, as amended, covers only inventory, but A and B remain as secured parties of record.

28-9-513. Termination statement. — (a) A secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement if the financing statement covers consumer goods and:

- (1) There is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or
- (2) The debtor did not authorize the filing of the initial financing statement.

(b) To comply with subsection (a) of this section, a secured party shall cause the secured party of record to file the termination statement:

- (1) Within one (1) month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or
- (2) If earlier, within twenty (20) days after the secured party receives an authenticated demand from a debtor.

(c) In cases not governed by subsection (a) of this section, within twenty (20) days after a secured party receives an authenticated demand from a

debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

- (1) Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;
- (2) The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;
- (3) The financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or
- (4) The debtor did not authorize the filing of the initial financing statement.

(d) Except as otherwise provided in section 28-9-510[, Idaho Code], upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. Except as otherwise provided in section 28-9-510[, Idaho Code], for purposes of sections 28-9-519(g), 28-9-522(a) and 28-9-523(c)[, Idaho Code], the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.

History.

I.C., § 28-9-513, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsection (d) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

RESEARCH REFERENCES

A.L.R. — Consignment transactions under Uniform Commercial Code Article 9 on Secured Transactions. 58 A.L.R.6th 289.

OFFICIAL COMMENT

- 1. **Source.** Former Section 9-404.
- 2. **Duty to File or Send.** This section specifies when a secured party must cause the secured party of record to file or send to the debtor a termination statement for a financing statement. Because most financing statements expire in five years unless a continuation statement is filed (Section 9-515), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of

consumer goods. Because many consumers will not realize the importance to them of clearing the public record, an affirmative duty is put on the secured party in that case. But many purchase-money security interests in consumer goods will not be filed, except for motor vehicles. See Section 9-309(1). Under Section 9-311(b), compliance with a certificate-of-title statute is "equivalent to the filing of a financing statement under this article." Thus, this section applies to a certificate of

title unless the section is superseded by a certificate-of-title statute that contains a specific rule addressing a secured party's duty to cause a notation of a security interest to be removed from a certificate of title. In the context of a certificate of title, however, the secured party could comply with this section by causing the removal itself or providing the debtor with documentation sufficient to enable the debtor to effect the removal.

Subsections (a) and (b) apply to a financing statement covering consumer goods. Subsection (c) applies to other financing statements. Subsection (a) and (c) each makes explicit what was implicit under former Article 9: If the debtor did not authorize the filing of a financing statement in the first place, the secured party of record should file or send a termination statement. The liability imposed upon a secured party that fails to comply with subsection (a) or (c) is identical to that imposed for the filing of an unauthorized financing statement or amendment. See Section 9-625(e).

3. **"Bogus" Filings.** A secured party's duty to send a termination statement arises when the secured party "receives" an authenticated demand from the debtor. In the case of an unauthorized financing statement, the person named as debtor in the financing statement may have no relationship with the named secured party and no reason to know the secured party's address. Inasmuch as the address in the financing statement is "held out by [the person named as secured party in the financing statement] as the place for receipt of such communications [i.e., communications relating to security interests]," the putative secured party is deemed to have "received" a notification delivered to that address. See Section 1-202(e). If a termination statement is not forthcoming, the person named as debtor itself may authorize the filing of a termination statement, which will be effective if it indicates that the person authorized it to be filed. See Sections 9-509(d)(2), 9-510(c).

4. **Buyers of Receivables.** Applied literally, former Section 9-404(1) would have required many buyers of receivables to file a termination statement immediately upon filing a financing statement because "there is no

outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value." Subsections (c)(1) and (2) remedy this problem. While the security interest of a buyer of accounts or chattel paper (B-1) is perfected, the debtor is not deemed to retain an interest in the sold receivables and thus could transfer no interest in them to another buyer (B-2) or to a lien creditor (LC). However, for purposes of determining the rights of the debtor's creditors and certain purchasers of accounts or chattel paper from the debtor, while B-1's security interest is unperfected, the debtor-seller is deemed to have rights in the sold receivables, and a competing security interest or judicial lien may attach to those rights. See Sections 9-318, 9-109, Comment 5. Suppose that B-1's security interest in certain accounts and chattel paper is perfected by filing, but the effectiveness of the financing statement lapses. Both before and after lapse, B-1 collects some of the receivables. After lapse, LC acquires a lien on the accounts and chattel paper. B-1's unperfected security interest in the accounts and chattel paper is subordinate to LC's rights. See Section 9-317(a)(2). But collections on accounts and chattel paper are not "accounts" or "chattel paper." Even if B-1's security interest in the accounts and chattel paper is or becomes unperfected, neither the debtor nor LC acquires rights to the collections that B-1 collects (and owns) before LC acquires a lien.

5. **Effect of Filing.** Subsection (d) states the effect of filing a termination statement: the related financing statement ceases to be effective. If one of several secured parties of record files a termination statement, subsection (d) applies only with respect to the rights of the person who authorized the filing of the termination statement. See Section 9-510(b). The financing statement remains effective with respect to the rights of the others. However, even if a financing statement is *terminated* (and thus no longer is effective) with respect to all secured parties of record, the financing statement, including the termination statement, will remain of record until at least one year after it lapses with respect to all secured parties of record. See Section 9-519(g).

28-9-514. Assignment of powers of secured party of record. —
(a) Except as otherwise provided in subsection (c) of this section, an initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party.

(b) Except as otherwise provided in subsection (c) of this section, a secured party of record may assign of record all or part of its power to

authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which:

- (1) Identifies, by its file number, the initial financing statement to which it relates;
- (2) Provides the name of the assignor; and
- (3) Provides the name and mailing address of the assignee.

(c) An assignment of record of a security interest in a fixture covered by a record of a mortgage which is effective as a financing statement filed as a fixture filing under section 28-9-502(c)[, Idaho Code,] may be made only by an assignment of record of the mortgage in the manner provided by law of this state other than the uniform commercial code.

History.

I.C., § 28-9-514, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (c) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-405.

2. **Assignments.** This section provides a permissive device whereby a secured party of record may effectuate an assignment of its power to affect a financing statement. It may also be useful for a secured party who has assigned all or part of its security interest or agricultural lien and wishes to have the fact noted of record, so that inquiries concerning the transaction would be addressed to the assignee. See Section 9-502, Comment 2. Upon the filing of an assignment, the assignee becomes the "secured party of record" and may authorize the filing of a continuation statement, termination statement, or other amendment. Note that under Section 9-310(c) no filing of an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. However, if an assignment is not filed, the assignor remains the secured party of record, with the power (even if not the right) to authorize the filing of effective amendments. See Sections 9-511(c), 9-509(d).

Where a record of a mortgage is effective as a financing statement filed as a fixture filing (Section 9-502(c)), then an assignment of re-

cord of the security interest may be made only in the manner in which an assignment of record of the mortgage may be made under local real-property law.

3. **Comparison to Prior Law.** Most of the changes reflected in this section are for clarification or to embrace medium-neutral drafting. As a general matter, this section preserves the opportunity given by former Section 9-405 to assign a security interest of record in one of two different ways. Under subsection (a), a secured party may assign all of its power to affect a financing statement by naming an assignee in the initial financing statement. The secured party of record may accomplish the same result under subsection (b) by making a subsequent filing. Subsection (b) also may be used for an assignment of only some of the secured party of record's power to affect a financing statement, e.g., the power to affect the financing statement as it relates to particular items of collateral or as it relates to an undivided interest in a security interest in all the collateral. An initial financing statement may not be used to change the secured party of record under these circumstances. However, an amendment adding the assignee as a secured party of record may be used.

28-9-515. Duration and effectiveness of financing statement — Effect of lapsed financing statement. — (a) Except as otherwise provided in section 28-9-705(g), Idaho Code, and subsections (b), (e), (f) and (g)

of this section, a filed financing statement is effective for a period of five (5) years after the date of filing.

(b) Except as otherwise provided in subsections (e), (f) and (g) of this section, an initial financing statement filed in connection with a public finance transaction or manufactured home transaction is effective for a period of thirty (30) years after the date of filing if it indicates that it is filed in connection with a public finance transaction or manufactured home transaction.

(c) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d) of this section. Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(d) Except as otherwise provided in section 28-9-705(g), Idaho Code, a continuation statement may be filed only within six (6) months before the expiration of the five (5) year period specified in subsection (a) of this section or the thirty (30) year period specified in subsection (b) of this section, whichever is applicable.

(e) Except as otherwise provided in sections 28-9-510 and 28-9-705(g), Idaho Code, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five (5) years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. Upon the expiration of the five (5) year period, the financing statement lapses in the same manner as provided in subsection (c) of this section, unless, before the lapse, another continuation statement is filed pursuant to subsection (d) of this section. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

(f) If a debtor is a transmitting utility and a filed initial financing statement so indicates, the financing statement is effective until a termination statement is filed.

(g) A record of a mortgage that is effective as a financing statement filed as a fixture filing under section 28-9-502(c), Idaho Code, remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

History.

I.C., § 28-9-515, as added by 2001, ch. 208,

§ 2, p. 704; am. 2002, ch. 107, § 4, p. 290; am. 2012, ch. 145, § 13, p. 381.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 145, inserted "initial" preceding "financial statement" in subsection (f).

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

OFFICIAL COMMENT

1. **Source.** Former Section 9-403(2), (3), (6).

2. **Period of Financing Statement's Effectiveness.** Subsection (a) states the general rule: a financing statement is effective for a five-year period unless its effectiveness is continued under this section or terminated under Section 9-513. Subsection (b) provides that if the financing statement relates to a public-finance transaction or a manufactured-home transaction and so indicates, the financing statement is effective for 30 years. These financings typically extend well beyond the standard, five-year period. Under subsection (f), a financing statement filed against a transmitting utility remains effective indefinitely, until a termination statement is filed. Likewise, under subsection (g), a mortgage effective as a fixture filing remains effective until its effectiveness terminates under real-property law.

3. **Lapse.** When the period of effectiveness under subsection (a) or (b) expires, the effectiveness of the financing statement lapses. The last sentence of subsection (c) addresses the effect of lapse. The deemed retroactive unperfection applies only with respect to purchasers for value; unlike former Section 9-403(2), it does not apply with respect to lien creditors.

Example 1: SP-1 and SP-2 both hold security interests in the same collateral. Both security interests are perfected by filing. SP-1 filed first and has priority under Section 9-322(a)(1). The effectiveness of SP-1's filing lapses. As long as SP-2's security interest remains perfected thereafter, SP-2 is entitled to priority over SP-1's security interest, which is deemed never to have been perfected as against a purchaser for value (SP-2). See Section 9-322(a)(2).

Example 2: SP holds a security interest perfected by filing. On July 1, LC acquires a judicial lien on the collateral. Two weeks later, the effectiveness of the financing statement lapses. Although the security interest becomes unperfected upon lapse, it was perfected when LC acquired its lien. Accordingly, notwithstanding the lapse, the perfected security interest has priority over the rights of LC, who is not a purchaser. See Section 9-317(a)(2).

4. **Effect of Debtor's Bankruptcy.** Under former Section 9-403(2), lapse was tolled if the debtor entered bankruptcy or another insolvency proceeding. Nevertheless, being unaware that insolvency proceedings had been commenced, filing offices routinely removed records from the files as if lapse had not been tolled. Subsection (c) deletes the former tolling provision and thereby imposes a new burden on the secured party: to be sure that a financing statement does not lapse during the debtor's bankruptcy. The secured party can prevent lapse by filing a continuation statement, even without first obtaining relief from the automatic stay. See Bankruptcy Code Section 362(b)(3). Of course, if the debtor enters bankruptcy before lapse, the provisions of this Article with respect to lapse would be of no effect to the extent that federal bankruptcy law dictates a contrary result (e.g., to the extent that the Bankruptcy Code determines rights as of the date of the filing of the bankruptcy petition).

5. **Continuation Statements.** Subsection (d) explains when a continuation statement may be filed. A continuation statement filed at a time other than that prescribed by subsection (d) is ineffective, see Section 9-510(c), and the filing office may not accept it. See Sections 9-520(a), 9-516(b). Subsection (e) specifies the effect of a continuation statement and provides for successive continuation statements.

28-9-516. What constitutes filing — Effectiveness of filing. —

(a) Except as otherwise provided in subsection (b) of this section, communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) Filing does not occur with respect to a record that a filing office refuses to accept because:

- (1) The record is not communicated by a method or medium of communication authorized by the filing office;
- (2) An amount equal to or greater than the applicable filing fee is not tendered;
- (3) The filing office is unable to index the record because:

- (A) in the case of an initial financing statement, the record does not provide a name for the debtor;
- (B) in the case of an amendment or information statement, the record:
 - (i) does not identify the initial financing statement as required by section 28-9-512 or 28-9-518, Idaho Code, as applicable; or
 - (ii) identifies an initial financing statement whose effectiveness has lapsed under section 28-9-515, Idaho Code;
- (C) in the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's surname; or
- (D) in the case of a record filed, or recorded, in the filing office described in section 28-9-501(a)(1), Idaho Code, the record does not provide a sufficient description of the real property to which it relates;
- (4) In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;
- (5) In the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, except for financing statements covering farm products and amendments of such financing statements, the record does not:
 - (A) provide a mailing address for the debtor; or
 - (B) indicate whether the name provided as the name of the debtor is the name of an individual or an organization;
- (6) In the case of an assignment reflected in an initial financing statement under section 28-9-514(a), Idaho Code, or an amendment filed under section 28-9-514(b), Idaho Code, the record does not provide a name and mailing address for the assignee;
- (7) In the case of a continuation statement, the record is not filed within the six (6) month period prescribed by section 28-9-515(d), Idaho Code;
- (8) In the case of a financing statement covering farm products, the financing statement does not contain all of the information specified in section 28-9-502(e), Idaho Code, and does not conform to the official form for farm products financing statements published by the secretary of state; or
- (9) In the case of an amendment or correction statement relating to a financing statement covering farm products, the amendment or correction statement does not conform to the official form for amendment or correction statements relating to financing statements covering farm products published by the secretary of state.
- (10) The filing office is prohibited from accepting the filing pursuant to the provisions of section 28-9-516A, Idaho Code.
- (c) For purposes of subsection (b) of this section:
 - (1) A record does not provide information if the filing office is unable to read or decipher the information; and
 - (2) A record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by section

28-9-512, 28-9-514 or 28-9-518, Idaho Code, is an initial financing statement.

(d) A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b) of this section, is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

History.

I.C., § 28-9-516, as added by 2001, ch. 208,

§ 2, p. 704; am. 2004, ch. 304, § 1, p. 852; am. 2012, ch. 145, § 14, p. 381.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 145, substituted “information” for “correction” in paragraph (b)(3)(B); rewrote paragraph (b)(5)(B) which read: “indicate whether the debtor is an individual or an organization”; and deleted paragraph (b)(5)(C), which related to a debtor as an organization.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Action by mortgagee.
Impairment of contractual obligation.
Personal property.
Possession as cure of void mortgage.
Possession equivalent to recording.
Power of sale in mortgagor.
Stipulation for possession by mortgagee.

Action by Mortgagee.

Where chattel mortgage contained stipulation authorizing mortgagee to take possession of property upon certain contingencies therein named, mortgagee, upon the occurrence of such contingency, could maintain action of claim and delivery to recover possession of property. *First Nat'l Bank v. Steers*, 9 Idaho 519, 75 P. 225 (1904).

Impairment of Contractual Obligation.

Mortgage of vendee's interest under contract of sale of realty did not require affidavit of good faith as in chattel mortgage, as such interest was real property. *Perkins v. Bundy*, 42 Idaho 560, 247 P. 751 (1926).

A statute attempting to enact that a mortgage was not enforceable after ten years from maturity of the debt secured thereby, or from date to which payment had been extended by agreement of record, in so far as it involved the mortgages in the cited case, constituted an impairment of the obligation of the contracts involved, so as to bring it within the inhibitions of Idaho Const., Art. I, § 10, and

such statutes were, to that extent, unconstitutional, in so far as applicable to such contracts. *Steward v. Nelson*, 54 Idaho 437, 32 P2d 843 (1934).

Personal Property.

Property of public service corporation necessary for maintenance, repair, and operation of its system was not to be regarded as “personal property,” but, together with real property, as constituting a single indissoluble unit. *Equitable Trust Co. v. Great Shoshone & Twin Falls Water Power Co.*, 228 F. 516 (D. Idaho 1915), *aff'd*, 245 F. 697 (9th Cir. 1917), *cert. denied*, 247 U.S. 513, 38 S. Ct. 580, 62 L. Ed. 1243 (1918).

Possession as Cure of Void Mortgage.

Where chattel mortgage was valid between parties, though for some reason it was void as to creditors, yet, if property were delivered to mortgagee prior to the time any specific right or lien thereon was acquired by creditor, possession of such mortgagee was valid, and could be maintained, and property sold under

the provisions of the mortgage. *Martin v. Holloway*, 16 Idaho 513, 102 P. 3 (1909).

Possession Equivalent to Recording.

If mortgagee receives and retains actual possession of mortgaged property, such possession is equivalent to the recording of such mortgage and gave to the world the same notice that was given by the recording of such mortgage. *Equitable Trust Co. v. Great Shoshone & Twin Falls Water Power Co.*, 245 F. 697 (9th Cir. 1917), cert. denied, 247 U.S. 513, 38 S. Ct. 580, 62 L. Ed. 1243 (1918); *Martin v. Holloway*, 16 Idaho 513, 102 P. 3 (1909).

Power of Sale in Mortgagor.

While mortgagor could retain possession of mortgaged property provided mortgage was executed and recorded as required by law, yet, if mortgagee permitted mortgagor not only to retain possession but to sell property at retail without also requiring proceeds of sale to be applied in reduction of debt, mortgage was void as against attaching creditors of mort-

gagor. *Lewiston Nat'l Bank v. Martin*, 2 Idaho (Hasb.) 734, 23 P. 920 (1890).

While mortgage on a stock of goods which permitted mortgagor to remain in the full and free use and enjoyment of the same was void, in that it permitted him to sell the goods in the usual course of trade, such a mortgage was valid when it covered wood corded and standing in forest where it had been cut. *Meyer v. Munro*, 9 Idaho 46, 71 P. 969 (1903).

Mortgage upon stock of goods remaining in hands of mortgagor with power to dispose of the same was void as to third parties. In re *Hickerson*, 162 F. 345 (D. Idaho 1908).

Stipulation for Possession by Mortgagee.

Former section recognized right of mortgagor to contract with mortgagee for the possession by the latter of mortgaged property, and mortgage was not rendered invalid by reason of a clause authorizing mortgagee upon named contingencies to take possession of mortgaged property. *First Nat'l Bank v. Steers*, 9 Idaho 519, 75 P. 225 (1904).

OFFICIAL COMMENT

1. **Source.** Subsection (a): former Section 9-403(1); the remainder is new.

2. **What Constitutes Filing.** Subsection (a) deals generically with what constitutes filing of a record, including an initial financing statement and amendments of all kinds (e.g., assignments, termination statements, and continuation statements). It follows former Section 9-403(1), under which either acceptance of a record by the filing office or presentation of the record and tender of the filing fee constitutes filing.

3. **Effectiveness of Rejected Record.** Subsection (b) provides an exclusive list of grounds upon which the filing office may reject a record. See Section 9-520(a). Although some of these grounds would also be grounds for rendering a filed record ineffective (e.g., an initial financing statement does not provide a name for the debtor), many others would not be (e.g., an initial financing statement does not provide a mailing address for the debtor or secured party of record). Neither this section nor Section 9-520 requires or authorizes the filing office to determine, or even consider, the accuracy of information provided in a record.

A financing statement or other record that is communicated to the filing office but which the filing office refuses to accept provides no public notice, regardless of the reason for the rejection. However, this section distinguishes between records that the filing office rightfully rejects and those that it wrongfully rejects. A filer is able to prevent a rightful rejection by complying with the requirements of subsection (b). No purpose is served by

giving effect to records that justifiably never find their way into the system, and subsection (b) so provides.

Subsection (d) deals with the filing office's unjustified refusal to accept a record. Here, the filer is in no position to prevent the rejection and as a general matter should not be prejudiced by it. Although wrongfully rejected records generally are effective, subsection (d) contains a special rule to protect a third-party purchaser of the collateral (e.g., a buyer or competing secured party) who gives value in reliance upon the apparent absence of the record from the files. As against a person who searches the public record and reasonably relies on what the public record shows, subsection (d) imposes upon the filer the risk that a record failed to make its way into the filing system because of the filing office's wrongful rejection of it. (Compare Section 9-517, under which a misindexed financing statement is fully effective.) This risk is likely to be small, particularly when a record is presented electronically, and the filer can guard against this risk by conducting a post-filing search of the records. Moreover, Section 9-520(b) requires the filing office to give prompt notice of its refusal to accept a record for filing.

4. **Method or Medium of Communication.** Rejection pursuant to subsection (b)(1) for failure to communicate a record properly should be understood to mean noncompliance with procedures relating to security, authentication, or other communication-related requirements that the filing office may impose. Subsection (b)(1) does not authorize a filing

office to impose additional substantive requirements. See Section 9-520, Comment 2.

5. Address for Secured Party of Record. Under subsection (b)(4) and Section 9-520(a), the lack of a mailing address for the secured party of record requires the filing office to reject an initial financing statement. The failure to include an address for the secured party of record no longer renders a financing statement ineffective. See Section 9-502(a). The function of the address is not to identify the secured party of record but rather to provide an address to which others can send required notifications, e.g., of a purchase-money security interest in inventory or of the disposition of collateral. Inasmuch as the address shown on a filed financing statement is an “address that is reasonable under the circumstances,” a person required to send a notification to the secured party may satisfy the requirement by sending a notification to that address, even if the address is or becomes incorrect. See Section 9-102 (definition of “send”). Similarly, because the address is “held out by [the secured party] as the place for receipt of such communications [i.e., communications relating to security interests],” the secured party is deemed to have received a notification delivered to that address. See Section 1-202(e).

6. Uncertainty Concerning Individual Debtor’s Surname. Subsection (b)(3)(C) requires the filing office to reject an initial

financing statement or amendment adding an individual debtor if the office cannot index the record because it does not identify the debtor’s surname (e.g., it is unclear whether the debtor’s surname is Elton or John).

7. Inability of Filing Office to Read or Decipher Information. Under subsection (c)(1), if the filing office cannot read or decipher information, the information is not provided by a record for purposes of subsection (b).

8. Classification of Records. For purposes of subsection (b), a record that does not indicate it is an amendment or identify an initial financing statement to which it relates is deemed to be an initial financing statement. See subsection (c)(2).

9. Effectiveness of Rejectable But Unrejected Record. Section 9-520(a) requires the filing office to refuse to accept an initial financing statement for a reason set forth in subsection (b). However, if the filing office accepts such a financing statement nevertheless, the financing statement generally is effective if it complies with the requirements of Section 9-502(a) and (b). See Section 9-520(c). Similarly, an otherwise effective financing statement generally remains so even though the information in the financing statement becomes incorrect. See Section 9-507(b). (Note that if the information required by subsection (b)(5) is incorrect when the financing statement is filed, Section 9-338 applies.)

28-9-516A. Filing officer duties. — (1) The filing officer shall not file an initial financing statement or financing statement amendment:

(a) Which contains an assumed business name for either an individual or a business entity other than a general partnership if the assumed business name is designated as an assumed business name and the true name of the person using the assumed business name is not included.

(b) When an individual debtor and an individual secured party would, as a result of the filing, appear to be the same individual on the financing statement.

(2) The filing officer may require, prior to filing, reasonable proof from the secured party that an individual debtor is in fact a “transmitting utility” as defined in section 28-9-102, Idaho Code, if a filing indicates that the debtor is a transmitting utility.

(3) The filing officer may, prior to filing, cause to be unreadable any signatures, social security account numbers, taxpayer identification numbers, and employer identification numbers that appear on financing statements or financing statement amendments.

(4) The secretary of state may petition the district court in Ada county for an order to show cause why filings not in compliance with subsections (1) and (2) of this section should not be deleted from the files and records of the secretary of state.

History.

I.C., § 28-9-516A, as added by 2003, ch.

206, § 1, p. 549; am. 2012, ch. 145, § 15, p. 381.

STATUTORY NOTES**Amendments.**

The 2012 amendment, by ch. 145, added “if the assumed business name is designated as an assumed business name and the true name of the person using the assumed name is not included” at the end of paragraph (1(a).

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

Compiler’s Notes.

This section is not derived from the uniform code.

28-9-517. Effect of indexing errors. — The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record.

History.

I.C., § 28-9-517, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES**Effective Dates.**

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS**DECISIONS UNDER PRIOR LAW****Misfiling.**

A mistake by a county recorder in misfiling a financing statement does not affect the perfection of the creditor’s security interest,

where the financing statement presented was proper even though no notice is given to subsequent searchers. *Wood v. Pillsbury Co.*, 38 Bankr. 375 (Bankr. D. Idaho 1983).

OFFICIAL COMMENT**1. Source.** New.

2. Effectiveness of Mis-Indexed Records. This section provides that the filing office’s error in mis-indexing a record does not render ineffective an otherwise effective re-

cord. As did former Section 9-401, this section imposes the risk of filing-office error on those who search the files rather than on those who file.

28-9-518. Claim concerning inaccurate or wrongfully filed record. — (a) A person may file in the filing office an information statement with respect to a record indexed there under the person’s name if the person believes that the record is inaccurate or was wrongfully filed.

(b) An information statement under subsection (a) of this section must:

- (1) Identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;
- (2) Indicate that it is an information statement; and
- (3) Provide the basis for the person’s belief that the record is inaccurate and indicate the manner in which the person believes the record should be

amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

(c) A person may file in the filing office an information statement with respect to a record filed there if the person is a secured party of record with respect to the financing statement to which the record relates and believes that the person that filed the record was not entitled to do so under section 28-9-509(d), Idaho Code.

(d) An information statement under subsection (c) of this section must:

(1) Identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) Indicate that it is an information statement; and

(3) Provide the basis for the person's belief that the person that filed the record was not entitled to do so under section 28-9-509(d), Idaho Code.

(e) The filing of an information statement does not affect the effectiveness of an initial financing statement or other filed record.

(f) An information statement may be filed in connection with the previous filing of a financing statement covering farm products under section 28-9-502, Idaho Code.

History.

I.C., § 28-9-518, as added by 2001, ch. 208,

§ 2, p. 704; am. 2007, ch. 317, § 2, p. 945; am. 2012, ch. 145, § 16, p. 381.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 317, added subsection (d).

The 2012 amendment, by ch. 145, substituted "an information statement" for "a correction statement" throughout the section; inserted "under subsection (a) of this section" in the introductory paragraph of (b); and added subsections (c) and (d), redesignating the subsequent subsections accordingly.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

OFFICIAL COMMENT

1. Source. New.

2. Information Statements. Former Article 9 did not afford a nonjudicial means for a debtor to indicate that a financing statement or other record was inaccurate or wrongfully filed. Subsection (a) affords the debtor the right to file an information statement. Among other requirements, the information statement must provide the basis for the debtor's belief that the public record should be corrected. See subsection (b). These provisions, which resemble the analogous remedy in the Fair Credit Reporting Act, 15 U.S.C. § 1681i, afford an aggrieved person the opportunity to state its position on the public record. They do not permit an aggrieved person to change the legal effect of the public record. Thus, although a filed information statement becomes part of the "financing statement," as defined in Section 9-102, the filing does not affect the

effectiveness of the initial financing statement or any other filed record. See subsection (e).

Sometimes a person files a termination statement or other record relating to a filed financing statement without being entitled to do so. A secured party of record with respect to the financing statement who believes that such a record has been filed may, but need not, file an information statement indicating that the person that filed the record was not entitled to do so. See subsection (c). An information statement has no legal effect. Its sole purpose is to provide some limited public notice that the efficacy of a filed record is disputed. If the person that filed the record was not entitled to do so, the filed record is ineffective, regardless of whether the secured party of record files an information statement. Likewise, if the person that filed the

record was entitled to do so, the filed record is effective, even if the secured party of record files an information statement. See Section 9-510(a), 9-518(e). Because an information statement filed under subsection (c) has no legal effect, a secured party of record—even one who is aware of the unauthorized filing of a record—has no duty to file one. Just as searchers bear the burden of determining whether the filing of initial financing statement was authorized, searchers bear the burden of determining whether the filing of every subsequent record was authorized.

Inasmuch as the filing of an information statement has no legal effect, this section does not provide a mechanism by which a secured party can correct an error that it discovers in its own financing statement.

This section does not displace other provi-

sions of this Article that impose liability for making unauthorized filings or failing to file or send a termination statement (see Section 9-625(e)), nor does it displace any available judicial remedies.

3. Resort to Other Law. This Article cannot provide a satisfactory or complete solution to problems caused by misuse of the public records. The problem of “bogus” filings is not limited to the UCC filing system but extends to the real-property records, as well. A summary judicial procedure for correcting the public record and criminal penalties for those who misuse the filing and recording systems are likely to be more effective and put less strain on the filing system than provisions authorizing or requiring action by filing and recording offices.

28-9-519. Numbering, maintaining, and indexing records — Communicating information provided in records. — (a) For each record filed in a filing office, the filing office shall:

- (1) Assign a unique number to the filed record;
- (2) Create a record that bears the number assigned to the filed record and the date and time of filing;
- (3) Maintain the filed record for public inspection; and
- (4) Index the filed record in accordance with subsections (c), (d) and (e) of this section.

(b) A file number assigned after January 1, 2002, must include a digit that:

- (1) Is mathematically derived from or related to the other digits of the file number; and
- (2) Aids the filing office in determining whether a number communicated as the file number includes a single digit or transpositional error.

(c) Except as otherwise provided in subsections (d) and (e) of this section, the filing office shall:

- (1) Index an initial financing statement according to the name of the debtor and index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement; and
 - (2) Index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided.
- (d) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, it must be filed for record and the filing office shall index it:

- (1) Under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and
- (2) To the extent that the law of this state provides for indexing of records of mortgages under the name of the mortgagee, under the name of the

secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

(e) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index an assignment filed under section 28-9-514(a)[, Idaho Code,] or an amendment filed under section 28-9-514(b)[, Idaho Code]:

(1) Under the name of the assignor as grantor; and

(2) To the extent that the law of this state provides for indexing a record of the assignment of a mortgage under the name of the assignee, under the name of the assignee.

(f) The filing office shall maintain a capability:

(1) To retrieve a record by the name of the debtor and by the file number assigned to the initial financing statement to which the record relates; and

(2) To associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

(g) The filing office may not remove a debtor's name from the index until one (1) year after the effectiveness of a financing statement naming the debtor lapses under section 28-9-515[, Idaho Code,] with respect to all secured parties of record.

(h) The filing office shall perform the acts required by subsections (a) through (e) of this section at the time and in the manner prescribed by filing office rule, but not later than two (2) business days after the filing office receives the record in question.

(i) Subsections (b) and (h) of this section do not apply to a filing office described in section 28-9-501(a)(1)[, Idaho Code].

History.

I.C., § 28-9-519, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (e), (g), and (i) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-403(4), (7), 9-405(2).

2. **Filing Office's Duties.** Subsections (a) through (e) set forth the duties of the filing office with respect to filed records. Subsection (h), which is new, imposes a minimum standard of performance for those duties. Prompt indexing is crucial to the effectiveness of any filing system. An accepted but unindexed record affords no public notice. Subsection (f) requires the filing office to maintain appropriate storage and retrieval facilities, and sub-

section (g) contains minimum requirements for the retention of records.

3. **File Number.** Subsection (a)(1) requires the filing office to assign a unique number to each filed record. That number is the "file number" only if the record is an initial financing statement. See Section 9-102.

4. **Time of Filing.** Subsection (a)(2) and Section 9-523 refer to the "date and time" of filing. The statutory text does not contain any instructions to a filing office as to how the

time of filing is to be determined. The method of determining or assigning a time of filing is an appropriate matter for filing-office rules to address.

5. **Related Records.** Subsections (c) and (f) are designed to ensure that an initial financing statement and all filed records relating to it are associated with one another, indexed under the name of the debtor, and retrieved together. To comply with subsection (f), a filing office (other than a real-property recording office in a State that enacts subsection (f), Alternative B) must be capable of retrieving records in each of two ways: by the name of the debtor and by the file number of the initial financing statement to which the record relates.

6. **Prohibition on Deleting Names from Index.** This Article contemplates that the filing office will not delete the name of a

debtor from the index until at least one year passes after the effectiveness of the financing statement lapses as to all secured parties of record. See subsection (g). This rule applies even if the filing office accepts an amendment purporting to delete or modify the name of a debtor or terminate the effectiveness of the financing statement. If an amendment provides a modified name for a debtor, the amended name should be added to the index, see subsection (c)(2), but the pre-amendment name should remain in the index.

Compared to former Article 9, the rule in subsection (g) increases the amount of information available to those who search the public records. The rule also contemplates that searchers — not the filing office — will determine the significance and effectiveness of filed records.

28-9-520. Acceptance and refusal to accept record. — (a) A filing office shall refuse to accept a record for filing for a reason set forth in section 28-9-516(b)[, Idaho Code,] and may refuse to accept a record for filing only for a reason set forth in section 28-9-516(b)[, Idaho Code].

(b) If a filing office refuses to accept a record for filing, it shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing office rule but, in the case of a filing office described in section 28-9-501(a)(2)[, Idaho Code], in no event more than two (2) business days after the filing office receives the record.

(c) A filed financing statement satisfying section 28-9-502(a) and (b)[, Idaho Code,] is effective, even if the filing office is required to refuse to accept it for filing under subsection (a) of this section. However, section 28-9-338[, Idaho Code,] applies to a filed financing statement providing information described in section 28-9-516(b)(5)[, Idaho Code,] which is incorrect at the time the financing statement is filed.

(d) If a record communicated to a filing office provides information that relates to more than one (1) debtor, this part applies as to each debtor separately.

History.

I.C., § 28-9-520, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New.

2. **Refusal to Accept Record for Filing.**

In some States, filing offices considered themselves obligated by former Article 9 to review

the form and content of a financing statement and to refuse to accept those that they determine are legally insufficient. Some filing offices imposed requirements for or conditions to filing that do not appear in the statute. Under this section, the filing office is not expected to make legal judgments and is not permitted to impose additional conditions or requirements.

Subsection (a) both prescribes and limits the bases upon which the filing office must and may reject records by reference to the reasons set forth in Section 9-516(b). For the most part, the bases for rejection are limited to those that prevent the filing office from dealing with a record that it receives—because some of the requisite information (e.g., the debtor's name) is missing or cannot be deciphered, because the record is not communicated by a method (e.g., it is MIME- rather than UU-encoded) or medium (e.g., it is written rather than electronic) that the filing office accepts, or because the filer fails to tender an amount equal to or greater than the filing fee.

3. Consequences of Accepting Rejectable Record. Section 9-516(b) includes among the reasons for rejecting an initial financing statement the failure to give certain information that is not required as a condition of effectiveness. In conjunction with Section 9-516(b)(5), this section requires the filing office to refuse to accept a financing statement that is legally sufficient to perfect a security interest under Section 9-502 but does not contain a mailing address for the debtor or disclose whether the debtor is an individual or an organization. The information required by Section 9-516(b)(5) assists search-

ers in weeding out “false positives,” i.e., records that a search reveals but which do not pertain to the debtor in question. It assists filers by helping to ensure that the debtor's name is correct and that the financing statement is filed in the proper jurisdiction.

If the filing office accepts a financing statement that does not give this information at all, the filing is fully effective. Section 9-520(c). The financing statement also generally is effective if the information is given but is incorrect; however, Section 9-338 affords protection to buyers and holders of perfected security interests who give value in reasonable reliance upon the incorrect information.

4. Filing Office's Duties with Respect to Rejected Record. Subsection (b) requires the filing office to communicate the fact of rejection and the reason therefor within a fixed period of time. Inasmuch as a rightfully rejected record is ineffective and a wrongfully rejected record is not fully effective, prompt communication concerning any rejection is important.

5. Partial Effectiveness of Record. Under subsection (d), the provisions of this Part apply to each debtor separately. Thus, a filing office may reject an initial financing statement or other record as to one named debtor but accept it as to the other.

Example: An initial financing statement is communicated to the filing office. The financing statement names two debtors, John Smith and Jane Smith. It contains all of the information described in Section 9-516(b)(5) with respect to John but lacks some of the information with respect to Jane. The filing office must accept the financing statement with respect to John, reject it with respect to Jane, and notify the filer of the rejection.

28-9-521. Uniform form of written financing statement and amendment. — (a) A filing office that accepts written records may not refuse to accept a written initial financing statement in the following form and format except for a reason set forth in section 28-9-516(b), Idaho Code:



UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS

| |
|--|
| A. NAME & PHONE OF CONTACT AT FILER (optional) |
| B. E-MAIL CONTACT AT FILER (optional) |
| C. SEND ACKNOWLEDGMENT TO: (Name and Address) |

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

| | | | | |
|--------------------------|---------------------|-------------------------------|-------------|---------|
| 1a. ORGANIZATION'S NAME | | | | |
| OR | | | | |
| 1b. INDIVIDUAL'S SURNAME | FIRST PERSONAL NAME | ADDITIONAL NAME(S)/INITIAL(S) | | SUFFIX |
| 1c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY |

2. DEBTOR'S NAME: Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

| | | | | |
|--------------------------|---------------------|-------------------------------|-------------|---------|
| 2a. ORGANIZATION'S NAME | | | | |
| OR | | | | |
| 2b. INDIVIDUAL'S SURNAME | FIRST PERSONAL NAME | ADDITIONAL NAME(S)/INITIAL(S) | | SUFFIX |
| 2c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY |

3. SECURED PARTY'S NAME (or NAME OF ASSIGNEE OF ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

| | | | | |
|--------------------------|---------------------|-------------------------------|-------------|---------|
| 3a. ORGANIZATION'S NAME | | | | |
| OR | | | | |
| 3b. INDIVIDUAL'S SURNAME | FIRST PERSONAL NAME | ADDITIONAL NAME(S)/INITIAL(S) | | SUFFIX |
| 3c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY |

4. COLLATERAL: This financing statement covers the following collateral:

| | |
|---|--|
| 5. Check <u>only</u> if applicable and check <u>only</u> one box: Collateral is <input type="checkbox"/> held in a Trust (see UCC1Ad, Item 17 and Instructions) <input type="checkbox"/> being administered by a Decedant's Personal Representative | |
| 6a. Check <u>only</u> if applicable and check <u>only</u> one box: <input type="checkbox"/> Public-Financia Transaction <input type="checkbox"/> Manufactured-Home Transaction <input type="checkbox"/> A Debtor is a Transmitting Utility | |
| 8b. Check <u>only</u> if applicable and check <u>only</u> one box: <input type="checkbox"/> Agricultural Lien <input type="checkbox"/> Non-UCC Filing | |
| 7. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> Lessee/Lessor <input type="checkbox"/> Consignee/Consignor <input type="checkbox"/> Seller/Buyer <input type="checkbox"/> Bailee/Bailor <input type="checkbox"/> Licensee/Licensor | |
| 8. OPTIONAL FILER REFERENCE DATA: | |

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS

9. NAME OF FIRST DEBTOR: Same as line 1a or 1b on Financing Statement; if line 1b was left blank because Individual Debtor name did not fit, check here ☐

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)SUFFIX

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

10. DEBTOR'S NAME: Provide (10a or 10b) only one additional Debtor name or Debtor name that did not fit in line 1b or 2b of the Financing Statement (Form UCC1) (use exact, full name, do not omit, modify, or abbreviate any part of the Debtor's name) and enter the mailing address in line 10c

10a. ORGANIZATION'S NAME

OR

10b. INDIVIDUAL'S SURNAME

INDIVIDUAL'S FIRST PERSONAL NAME

INDIVIDUAL'S ADDITIONAL NAME(S)/INITIAL(S)SUFFIX

10c. MAILING ADDRESSCITYSTATEPOSTAL CODECOUNTRY

11. ☐ ADDITIONAL SECURED PARTY'S NAME or ☐ ASSIGNOR SECURED PARTY'S NAME: Provide only one name (11a or 11b)

11a. ORGANIZATION'S NAME

OR

11b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)SUFFIX

11c. MAILING ADDRESSCITYSTATEPOSTAL CODECOUNTRY

12. ADDITIONAL SPACE FOR ITEM 4 (Collateral):

13. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS (if applicable)

14. This FINANCING STATEMENT:
☐ covers timber to be cut ☐ covers as-extracted collateral ☐ is filed as a fixture filing

15. Name and address of a RECORD OWNER of real estate described in item 16 (if Debtor does not have a record interest):

16. Description of real estate:

17. MISCELLANEOUS:

(b) A filing office that accepts written records may not refuse to accept a written record in the following form and format except for a reason set forth in section 28-9-516(b), Idaho Code:

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. E-MAIL CONTACT AT FILER (optional)

C. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE NUMBER

1b. ☐ This FINANCING STATEMENT AMENDMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS
Filer: attach Amendment Addendum (Form UCC3Ad) and provide Debtor's name in item 13

2. ☐ TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to the security interest(s) of Secured Party authorizing this Termination Statement

3. ☐ ASSIGNMENT (full or partial): Provide name of Assignee in item 7a or 7b, and address of Assignee in item 7c and name of Assignor in item 9
For partial assignment, complete items 7 and 9 and also indicate affected collateral in item 8

4. ☐ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to the security interest(s) of Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law

5. ☐ PARTY INFORMATION CHANGE:
Check one of these two boxes: AND Check one of these three boxes to:
This Change affects ☐ Debtor or ☐ Secured Party of record ☐ CHANGE name and/or address: Complete item 6a or 6b, and item 7a or 7b and item 7c ☐ ADD name: Complete item 7a or 7b, and item 7c ☐ DELETE name: Give record name to be deleted in item 6a or 6b

6. CURRENT RECORD INFORMATION: Complete for Party Information Change - provide only one name (6a or 6b)

6a. ORGANIZATION'S NAME

OR

6b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

7. CHANGED OR ADDED INFORMATION: Complete for Assignment or Party Information Change - provide only one name (7a or 7b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)

7a. ORGANIZATION'S NAME

OR

7b. INDIVIDUAL'S SURNAME

INDIVIDUAL'S FIRST PERSONAL NAME

INDIVIDUAL'S ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

7c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

8. ☐ COLLATERAL CHANGE: Also check one of these four boxes: ☐ ADD collateral ☐ DELETE collateral ☐ RESTATE covered collateral ☐ ASSIGN collateral
Indicate collateral:

9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT: Provide only one name (9a or 9b) (name of Assignor, if this is an Assignment)
If this is an Amendment authorized by a DEBTOR, check here ☐ and provide name of authorizing Debtor

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

10. OPTIONAL FILER REFERENCE DATA:

UCC FINANCING STATEMENT AMENDMENT ADDENDUM

FOLLOW INSTRUCTIONS

| | |
|--|--------|
| 11. INITIAL FINANCING STATEMENT FILE NUMBER: Same as item 1a on Amendment form | |
| 12. NAME OF PARTY AUTHORIZING THIS AMENDMENT: Same as item 9 on Amendment form | |
| 12a. ORGANIZATION'S NAME | |
| | |
| OR | |
| 12b. INDIVIDUAL'S SURNAME | |
| FIRST PERSONAL NAME | |
| ADDITIONAL NAME(S)/INITIAL(S) | SUFFIX |

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

| | | | |
|--|---------------------|-------------------------------|--------|
| 13. Name of DEBTOR on related financing statement (Name of a current Debtor of record required for indexing purposes only in some filing offices - see Instruction item 13): Provide only one Debtor name (13a or 13b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); see instructions if name does not fit | | | |
| 13a. ORGANIZATION'S NAME | | | |
| OR | | | |
| 13b. INDIVIDUAL'S SURNAME | FIRST PERSONAL NAME | ADDITIONAL NAME(S)/INITIAL(S) | SUFFIX |

14. ADDITIONAL SPACE FOR ITEM 8 (Collateral):

| | |
|---|---------------------------------|
| 15. This FINANCING STATEMENT AMENDMENT: <input type="checkbox"/> covers timber to be cut <input type="checkbox"/> covers es-extracted collateral <input type="checkbox"/> is filed as a fixture filing | 17. Description of real estate: |
| 16. Name and address of a RECORD OWNER of real estate described in item 17 (if Debtor does not have a record interest): | |

| |
|--------------------|
| 18. MISCELLANEOUS: |
|--------------------|

History.

I.C., § 28-9-521, as added by 2012, ch. 145,
§ 18, p. 381.

STATUTORY NOTES**Effective Dates.**

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after
July 1, 2001.

OFFICIAL COMMENT**1. Source.** New.

2. “Safe Harbor” Written Forms. Although Section 9-520 limits the bases upon which the filing office can refuse to accept records, this section provides sample written forms that must be accepted in every filing office in the country, as long as the filing office’s rules permit it to accept written communications. By completing one of the forms in this section, a secured party can be certain that the filing office is obligated to accept it.

The forms in this section are based upon national financing statement forms that were in use under former Article 9. Those forms were developed over an extended period and reflect the comments and suggestions of filing officers, secured parties and their counsel, and service companies. The formatting of those forms and of the ones in this section has been designed to reduce error by both filers and filing offices.

A filing office that accepts written communications may not reject, on grounds of form

or format, a filing using these forms. Although filers are not required to use the forms, they are encouraged and can be expected to do so, inasmuch as the forms are well designed and avoid the risk of rejection on the basis of form or format. As their use expands, the forms will rapidly become familiar to both filers and filing-office personnel. Filing offices may and should encourage the use of these forms by declaring them to be the “standard” (but not exclusive) forms for each jurisdiction, albeit without in any way suggesting that alternative forms are unacceptable.

The multi-purpose form in subsection (b) covers changes with respect to the debtor, the secured party, the collateral, and the status of the financing statement (termination and continuation). A single form may be used for several different types of amendments at once (e.g., both to change a debtor’s name and continue the effectiveness of the financing statement).

28-9-522. Maintenance and destruction of records. — (a) The filing office shall maintain a record of the information provided in a filed financing statement for at least one (1) year after the effectiveness of the financing statement has lapsed under section 28-9-515[, Idaho Code,] with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and by using the file number assigned to the initial financing statement to which the record relates.

(b) Except to the extent that a statute governing disposition of public records provides otherwise, the filing office immediately may destroy any written record evidencing a financing statement. However, if the filing office destroys a written record, it shall maintain another record of the financing statement which complies with subsection (a) of this section.

History.

I.C., § 28-9-522, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Compiler’s Notes.**

The bracketed insertion in subsection (a) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-403(3), revised substantially.

2. **Maintenance of Records.** Section 9-523 requires the filing office to provide information concerning certain lapsed financing statements. Accordingly, subsection (a) requires the filing office to maintain a record of the information in a financing statement for at least one year after lapse. During that time, the filing office may not delete any information with respect to a filed financing statement; it may only add information. This approach relieves the filing office from any duty to determine whether to substitute or

delete information upon receipt of an amendment. It also assures searchers that they will receive all information with respect to financing statements filed against a debtor and thereby be able themselves to determine the state of the public record.

The filing office may maintain this information in any medium. Subsection (b) permits the filing office immediately to destroy written records evidencing a financing statement, provided that the filing office maintains another record of the information contained in the financing statement as required by subsection (a).

28-9-523. Information from filing office — Sale or license of records — Farm products — Master lists. — (a) If a person that files a written record requests an acknowledgment of the filing, the filing office shall send to the person an image of the record showing the number assigned to the record pursuant to section 28-9-519(a)(1)[, Idaho Code,] and the date and time of the filing of the record. However, if the person furnishes a copy of the record to the filing office, the filing office may instead:

(1) Note upon the copy the number assigned to the record pursuant to section 28-9-519(a)(1)[, Idaho Code,] and the date and time of the filing of the record; and

(2) Send the copy to the person.

(b) If a person files a record other than a written record, the filing office shall communicate to the person an acknowledgment that provides:

(1) The information in the record;

(2) The number assigned to the record pursuant to section 28-9-519(a)(1)[, Idaho Code]; and

(3) The date and time of the filing of the record.

(c) The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:

(1) Whether there is on file on a date and time specified by the filing office, but not a date earlier than three (3) business days before the filing office receives the request, any financing statement that:

(A) designates a particular debtor;

(B) has not lapsed under section 28-9-515[, Idaho Code,] with respect to all secured parties of record; and

(C) if the request so states, has lapsed under section 28-9-515[, Idaho Code,] and a record of which is maintained by the filing office under section 28-9-522(a)[, Idaho Code];

(2) The date and time of filing of each financing statement; and

(3) The information provided in each financing statement.

(d) In complying with its duty under subsection (c) of this section, the filing office may communicate information in any medium. However, if requested, the filing office shall communicate information by issuing a record that can be admitted into evidence in the courts of this state without extrinsic evidence of its authenticity.

(e) The filing office shall perform the acts required by subsections (a) through (d) of this section at the time and in the manner prescribed by filing office rule, but in the case of a filing office described in section 28-9-501(a)(2)[, Idaho Code], not later than two (2) business days after the filing office receives the request.

(f) At least weekly, the filing office shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this part, in every medium from time to time available to the filing office.

(g) The secretary of state shall maintain a central filing system containing the information filed with his office pursuant to section 28-9-502(e)[, Idaho Code]. Under this system the secretary shall record the date and time of filing and compile the information into a master list organized according to farm products. The list shall be organized within each farm product category in alphabetical order according to the last name of the borrower or, in the case of borrowers doing business other than as individuals, the first word in the name of such borrower. The list shall be further organized according to and contain information required by federal law and regulation. The secretary of state shall, by duly adopted administrative rule, designate the categories of farm products to be used in compiling the master list. The secretary of state may establish and maintain, pursuant to duly adopted administrative rule, a separate system for filing of financing statements and search, retrieval and dissemination of information relating to financing statements for farm products, and require separate search requests for such information pursuant to a fee schedule to be established in such administrative rule.

(h) The secretary of state shall maintain a list of all buyers of farm products, commission merchants, and selling agents who register with the secretary of state indicating an interest in receiving the lists described in subsection (i) of this section.

(i) The secretary of state shall distribute complete master lists for each farm product category at least quarterly to each buyer, commission merchant and selling agent registered under subsection (h) of this section and distribute either complete lists or cumulative supplements, which supplements shall be issued not less frequently than semimonthly, of financing statements covering farm products filed subsequent to the last date of filing for financing statements on the last preceding quarterly master list, which the buyer, commission merchant or selling agent has requested. The date of receipt for lists and supplements shall be the third calendar day following the date of mailing by the secretary of state, or in the event the mail is not delivered on that day, the first day thereafter on which mail is delivered.

(j) Upon the request of any person the secretary of state shall provide, within twenty-four (24) hours, an oral confirmation of the filing of the financing statement covering farm products followed by a written confirmation.

(k) Upon request of any person, the filing officer shall furnish copies of particular filed financing statements covering farm products or statements of assignment covering farm products at a uniform cost of one dollar (\$1.00) per page if the requestor provides the filing officer with the file numbers of the statement to be copied.

History.

I.C., § 28-9-523, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions in subsections (a), (b), (c), and (e) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-407; subsections (d) and (e) are new.

2. **Filing Office's Duty to Provide Information.** Former Section 9-407, dealing with obtaining information from the filing office, was bracketed to suggest to legislatures that its enactment was optional. Experience has shown that the method by which interested persons can obtain information concerning the public records should be uniform. Accordingly, the analogous provisions of this Article are not in brackets.

Most of the other changes from former Section 9-407 are for clarification, to embrace medium-neutral drafting, or to impose standards of performance on the filing office.

3. **Acknowledgments of Filing.** Subsections (a) and (b) require the filing office to acknowledge the filing of a record. Under subsection (a), the filing office is required to acknowledge the filing of a written record only upon request of the filer. Subsection (b) requires the filing office to acknowledge the filing of a non-written record even in the absence of a request from the filer.

4. **Response to Search Request.** Subsection (c)(3) requires the filing office to provide "the information contained in each financing statement" to a person who requests it. This requirement can be satisfied by providing copies, images, or reports. The requirement does not in any manner inhibit the filing office from also offering to provide less than all of the information (presumably for a lower fee) to a person who asks for less. Thus, subsection (c) accommodates the practice of providing only the type of record (e.g., initial financing statement, continuation statement), number assigned to the record, date and time of filing, and names and addresses of the debtor and secured party when a requesting person asks for no more (i.e., when the person does not ask for copies of financing statements). In contrast, the filing office's obligation under subsection (b) to provide an acknowledgment containing "the information contained in the record" is not defined by a customer's request. Thus unless the filer stipulates otherwise, to comply with subsection

(b) the filing office's acknowledgment must contain all of the information in a record.

Subsection (c) assures that a minimum amount of information about filed records will be available to the public. It does not preclude a filing office from offering additional services.

5. **Lapsed and Terminated Financing Statements.** This section reflects the policy that terminated financing statements will remain part of the filing office's data base. The filing office may remove from the data base only lapsed financing statements, and then only when at least a year has passed after lapse. See Section 9-519(g). Subsection (c)(1)(C) requires a filing office to conduct a search and report as to lapsed financing statements that have not been removed from the data base, when requested.

6. **Search by Debtor's Address.** Subsection (c)(1)(A) contemplates that, by making a single request, a searcher will receive the results of a search of the entire public record maintained by any given filing office. Addition of the bracketed language in subsection (c)(1)(A) would permit a search report limited to financing statements showing a particular address for the debtor, but only if the search request is so limited. With or without the bracketed language, this subsection does not permit the filing office to compel a searcher to limit a request by address.

7. **Medium of Communication; Certificates.** Former Article 9 provided that the filing office respond to a request for information by providing a certificate. The principle of medium-neutrality would suggest that the statute not require a written certificate. Subsection (d) follows this principle by permitting the filing office to respond by communicating "in any medium." By permitting communication "in any medium," subsection (d) is not inconsistent with a system in which persons other than filing office staff conduct searches of the filing office's (computer) records.

Some searchers find it necessary to introduce the results of their search into evidence. Because official written certificates might be introduced into evidence more easily than official communications in another medium, subsection (d) affords States the option of

requiring the filing office to issue written certificates upon request. The alternative bracketed language in subsection (d) recognizes that some States may prefer to permit the filing office to respond in another medium, as long as the response can be admitted into evidence in the courts of that State without extrinsic evidence of its authenticity.

8. **Performance Standard.** The utility of the filing system depends on the ability of searchers to get current information quickly. Accordingly, subsection (e) requires that the filing office respond to a request for information no later than two business days after it receives the request. The information con-

tained in the response must be current as of a date no earlier than three business days before the filing office receives the request. See subsection (c)(1). The failure of the filing office to comply with performance standards, such as subsection (e), has no effect on the private rights of persons affected by the filing of records.

9. **Sales of Records in Bulk.** Subsection (f), which is new, mandates that the appropriate official or the filing office sell or license the filing records to the public in bulk, on a nonexclusive basis, in every medium available to the filing office. The details of implementation are left to filing-office rules.

28-9-524. Delay by filing office. — Delay by the filing office beyond a time limit prescribed by this part is excused if:

- (1) The delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office; and
- (2) The filing office exercises reasonable diligence under the circumstances.

History.

I.C., § 28-9-524, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

Source. New; derived from Section 4-109.

28-9-525. Fees. — (a) Except as otherwise provided in subsection (e) of this section, the fee for filing and indexing a record under this part, other than an initial financing statement of the kind described in section 28-9-502(c)[, Idaho Code], is:

- (1) Six dollars (\$6.00) if the record is communicated in writing and consists of one (1) or two (2) pages;
 - (2) Twelve dollars (\$12.00) if the record is communicated in writing and consists of more than two (2) pages; and
 - (3) Three dollars (\$3.00) if the record is communicated by another medium authorized by filing office rule.
- (b) Except as otherwise provided in subsection (e) of this section, the fee for filing and indexing an initial financing statement of the kind described in section 28-9-502(c)[, Idaho Code,] is the amount specified in subsection (c) of this section, if applicable.
- (c) The number of names required to be indexed does not affect the amount of the fee in subsections (a) and (b) of this section.
- (d) The fee for responding to a request for information from the filing

office, including for issuing a certificate showing whether there is on file any financing statement naming a particular debtor, is twelve dollars (\$12.00).

(e) This section does not require a fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under section 28-9-502(c)[, Idaho Code]. However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply.

(f) The secretary of state shall, by administrative rule, establish a fee schedule for filing and indexing and other matters relating to filing of financing statements covering farm products and for public access to the secretary of state's files which are open to public inspection. A secured party shall provide an itemization of fees paid by the secured party for filing, searches or other matters related to filing of financing statements covering farm products pertaining to that debtor.

History.

I.C., § 28-9-525, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (a), (b), and (e) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Various sections of former Part 4.

2. **Fees.** This section contains all fee requirements for filing, indexing, and responding to requests for information. Uniformity in the fee structure (but not necessarily in the amount of fees) makes this Article easier for secured parties to use and reduces the likelihood that a filed record will be rejected for failure to pay at least the correct amount of the fee. See Section 9-516(b)(2).

The costs of processing electronic records are less than those with respect to written records. Accordingly, this section mandates a lower fee as an incentive to file electronically and imposes the additional charge (if any) for multiple debtors only with respect to written

records. When written records are used, this Article encourages the use of the uniform forms in Section 9-521. The fee for filing these forms should be no greater than the fee for other written records.

To make the relevant information included in a filed record more accessible once the record is found, this section mandates a higher fee for longer written records than for shorter ones. Finally, recognizing that financing statements naming more than one debtor are most often filed against a husband and wife, any additional charge for multiple debtors applies to records filed with respect to more than two debtors, rather than with respect to more than one.

28-9-526. Filing office rules. — (a) The secretary of state shall promulgate rules to implement this chapter. The filing office rules must be:

- (1) Consistent with this chapter; and
- (2) Promulgated in accordance with the administrative procedure act, chapter 52, title 67, Idaho Code.

(b) To keep the filing office rules and practices of the filing office in harmony with the rules and practices of filing offices in other jurisdictions that enact substantially this part, and to keep the technology used by the

filing office compatible with the technology used by filing offices in other jurisdictions that enact substantially this part, the secretary of state, so far as is consistent with the purposes, policies and provisions of this chapter, in adopting, amending and repealing filing office rules, shall:

- (1) Consult with filing offices in other jurisdictions that enact substantially this part; and
- (2) Consult the most recent version of the model rules promulgated by the international association of corporate administrators or any successor organization; and
- (3) Take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this part.

History.

I.C., § 28-9-526, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after
July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New; subsection (b) derives in part from the Uniform Consumer Credit Code (1974).

2. **Rules Required.** Operating a filing office is a complicated business, requiring many more rules and procedures than this Article can usefully provide. Subsection (a) requires the adoption of rules to carry out the provisions of Article 9. The filing-office rules must be consistent with the provisions of the statute and adopted in accordance with local procedures. The publication requirement informs secured parties about filing-office practices, aids secured parties in evaluating filing-related risks and costs, and promotes regularity of application within the filing office.

3. **Importance of Uniformity.** In today's national economy, uniformity of the policies and practices of the filing offices will reduce the costs of secured transactions substantially. The International Association of Corporate Administrators (IACA), referred to in subsection (b), is an organization whose membership includes filing officers from every State. These individuals are responsible for

the proper functioning of the Article 9 filing system and have worked diligently to develop model filing-office rules, with a view toward efficiency and uniformity.

Although uniformity is an important desideratum, subsection (a) affords considerable flexibility in the adoption of filing-office rules. Each State may adopt a version of subsection (a) that reflects the desired relationship between the statewide filing office described in Section 9-501(a)(2) and the local filing offices described in Section 9-501(a)(1) and that takes into account the practices of its filing offices. Subsection (a) need not designate a single official or agency to adopt rules applicable to all filing offices, and the rules applicable to the statewide filing office need not be identical to those applicable to the local filing office. For example, subsection (a) might provide for the statewide filing office to adopt filing-office rules, and, if not prohibited by other law, the filing office might adopt one set of rules for itself and another for local offices. Or, subsection (a) might designate one official or agency to adopt rules for the statewide filing office and another to adopt rules for local filing offices.

PART 6. DEFAULT

28-9-601. Rights after default — Judicial enforcement — Consignor or buyer of accounts, chattel paper, payment intangibles or promissory notes. — (a) After default, a secured party has the rights

provided in this part and, except as otherwise provided in section 28-9-602[, Idaho Code], those provided by agreement of the parties. A secured party:

(1) May reduce a claim to judgment, foreclose or otherwise enforce the claim, security interest or agricultural lien by any available judicial procedure; and

(2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) A secured party in possession of collateral or control of collateral under section 28-7-106, 28-9-104, 28-9-105, 28-9-106 or 28-9-107[, Idaho Code,] has the rights and duties provided in section 28-9-207[, Idaho Code].

(c) The rights under subsections (a) and (b) of this section are cumulative and may be exercised simultaneously.

(d) Except as otherwise provided in subsection (g) of this section and section 28-9-605[, Idaho Code], after default, a debtor and an obligor have the rights provided in this part and by agreement of the parties.

(e) If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

(1) The date of perfection of the security interest or agricultural lien in the collateral;

(2) The date of filing a financing statement covering the collateral; or

(3) Any date specified in a statute under which the agricultural lien was created.

(f) A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this chapter.

(g) Except as otherwise provided in section 28-9-607(c)[, Idaho Code], this part imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes.

History.

I.C., § 28-9-601, as added by 2001, ch. 208,
§ 2, p. 704; am. 2004, ch. 42, § 32, p. 77.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Application.

Breach of peace.

Conversion of mortgaged property.

Long arm jurisdiction.

Repossession under invalid statute.

Application.

The peaceful repossession requirement of this section is not applicable when a creditor resorts to judicial action. When a secured party avails itself of judicial process, the statute governing that process determines whether repossession was properly conducted. *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980).

Breach of Peace.

The cutting of a farmer's chain or padlock in order to repossess combine would not constitute a breach of the peace warranting the award of punitive damages in the context of a self-help repossession where the repossession occurred on the farmer's, not the debtor's, property, the farmer did not object to the cutting and the record did not reflect any possibility of violence or physical confrontation. *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980).

Even if entitled to effect a self-help repossession, a secured party may only exercise his right of self-help repossession so long as repossession may be accomplished without breach of peace; whether possession occurred lawfully and without breach of peace is determined by the law of the jurisdiction where the collateral is located. *Schwilling v. Horne*, 105 Idaho 294, 669 P.2d 183 (1983).

Conversion of Mortgaged Property.

If mortgage provides that mortgagee can take possession for breach of conditions of mortgage, then courts have held that such breach of condition coupled with right to pos-

session gives mortgagee such qualified ownership as will enable him to maintain action for conversion. *Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 231, 266 P. 659 (1928).

Long Arm Jurisdiction.

Where the nature of an Idaho creditor's contract with Alaska, which was one of the factors to be considered in determining whether Alaska was entitled to assert personal jurisdiction over him, was merely a valid exercise of his right to self-help repossession under the security agreement executed in his favor in conjunction with the sale of an airplane, that conduct alone would be insufficient to subject the creditor seller to jurisdiction under the Alaska long arm statute. *Schwilling v. Horne*, 105 Idaho 294, 669 P.2d 183 (1983).

Repossession Under Invalid Statute.

Where seller repossessed farm machinery, following buyer's default, by proceeding under unconstitutional claim and delivery statute rather than by self-help repossession, such course of action was at most a technical violation of due process requirements entitling the buyer to only nominal damages since buyer's alleged damages, including emotional distress suffered when buyer had to explain to clients for whom he could no longer perform farm work, resulted not from the procedural deficiencies of the repossession but from the fact that buyer no longer had possession of the machinery. *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980).

RESEARCH REFERENCES

A.L.R. — Secured transactions: right of secured party to take possession of collateral on default under UCC § 9-503. 25 A.L.R.5th 696.

Validity, under Federal Constitution and laws of self-help repossession provision of § 9-503 of Uniform Commercial Code. 29 A.L.R. Fed. 418.

OFFICIAL COMMENT

1. **Source.** Former Section 9-501(1), (2), (5).

2. **Enforcement: In General.** The rights of a secured party to enforce its security interest in collateral after the debtor's default are an important feature of a secured transaction. (Note that the term "rights," as defined in Section 1-201, includes "remedies.") This Part provides those rights as well as certain limitations on their exercise for the protection of the defaulting debtor, other creditors, and other affected persons. However, subsections (a) and (d) make clear that the rights provided in this Part do not exclude other rights provided by agreement.

3. **When Remedies Arise.** Under subsection (a) the secured party's rights arise "[a]f-

ter default." As did former Section 9-501, this Article leaves to the agreement of the parties the circumstances giving rise to a default. This Article does not determine whether a secured party's post-default conduct can constitute a waiver of default in the face of an agreement stating that such conduct shall not constitute a waiver. Rather, it continues to leave to the parties' agreement, as supplemented by law other than this Article, the determination whether a default has occurred or has been waived. See Section 1-103.

4. **Possession of Collateral; Section 9-207.** After a secured party takes possession of collateral following a default, there is no longer any distinction between a security interest that before default was nonpossessory

and a security interest that was possessory before default, as under a common-law pledge. This Part generally does not distinguish between the rights of a secured party with a nonpossessory security interest and those of a secured party with a possessory security interest. However, Section 9-207 addresses rights and duties with respect to collateral in a secured party's possession. Under subsection (b) of this section, Section 9-207 applies not only to possession before default but also to possession after default. Subsection (b) also has been conformed to Section 9-207, which, unlike former Section 9-207, applies to secured parties having control of collateral.

5. **Cumulative Remedies.** Former Section 9-501(1) provided that the secured party's remedies were cumulative, but it did not explicitly provide whether the remedies could be exercised simultaneously. Subsection (c) permits the simultaneous exercise of remedies if the secured party acts in good faith. The liability scheme of Subpart 2 affords redress to an aggrieved debtor or obligor. Moreover, permitting the simultaneous exercise of remedies under subsection (c) does not override any non-UCC law, including the law of tort and statutes regulating collection of debts, under which the simultaneous exercise of remedies in a particular case constitutes abusive behavior or harassment giving rise to liability.

6. **Judicial Enforcement.** Under subsection (a) a secured party may reduce its claim to judgment or foreclose its interest by any available procedure outside this Article under applicable law. Subsection (e) generally follows former Section 9-501(5). It makes clear that any judicial lien that the secured party may acquire against the collateral effectively is a continuation of the original security interest (if perfected) and not the acquisition of a new interest or a transfer of property on account of a preexisting obligation. Under former Section 9-501(5), the judicial lien was stated to relate back to the date of perfection

of the security interest. Subsection (e), however, provides that the lien relates back to the earlier of the date of filing or the date of perfection. This provides a secured party who enforces a security interest by judicial process with the benefit of the "first-to-file-or-perfect" priority rule of Section 9-322(a)(1).

7. **Agricultural Liens.** Part 6 provides parallel treatment for the enforcement of agricultural liens and security interests. Because agricultural liens are statutory rather than consensual, this Article does draw a few distinctions between these liens and security interests. Under subsection (e), the statute creating an agricultural lien would govern whether and the date to which an execution lien relates back. Section 9-606 explains when a "default" occurs in the agricultural lien context.

8. **Execution Sales.** Subsection (f) also follows former Section 9-501(5). It makes clear that an execution sale is an appropriate method of foreclosure contemplated by this Part. However, the sale is governed by other law and not by this Article, and the limitations under Section 9-610 on the right of a secured party to purchase collateral do not apply.

9. **Sales of Receivables; Consignments.** Subsection (g) provides that, except as provided in Section 9-607(c), the duties imposed on secured parties do not apply to buyers of accounts, chattel paper, payment intangibles, or promissory notes. Although denominated "secured parties," these buyers own the entire interest in the property sold and so may enforce their rights without regard to the seller ("debtor") or the seller's creditors. Likewise, a true consignor may enforce its ownership interest under other law without regard to the duties that this Part imposes on secured parties. Note, however, that Section 9-615 governs cases in which a consignee's secured party (other than a consignor) is enforcing a security interest that is senior to the security interest (i.e., ownership interest) of a true consignor.

28-9-602. Waiver and variance of rights and duties. — Except as otherwise provided in section 28-9-624[, Idaho Code], to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

(1) Section 28-9-207(b)(4)(C)[, Idaho Code], which deals with use and operation of the collateral by the secured party;

(2) Section 28-9-21[, Idaho Code], which deals with requests for an accounting and requests concerning a list of collateral and statement of account;

(3) Section 28-9-607(c)[, Idaho Code], which deals with collection and enforcement of collateral;

(4) Sections 28-9-608(a) and 28-9-615(c)[, Idaho Code,] to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;

(5) Sections 28-9-608(a) and 28-9-615(d)[, Idaho Code,] to the extent that they require accounting for or payment of surplus proceeds of collateral;

(6) Section 28-9-609[, Idaho Code,] to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace;

(7) Sections 28-9-610(b), 28-9-611, 28-9-613 and 28-9-614[, Idaho Code,], which deal with disposition of collateral;

(8) Section 28-9-615(f)[, Idaho Code,], which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor;

(9) Section 28-9-616[, Idaho Code,], which deals with explanation of the calculation of a surplus or deficiency;

(10) Sections 28-9-620, 28-9-621 and 28-9-622[, Idaho Code,], which deal with acceptance of collateral in satisfaction of obligation;

(11) Section 28-9-623[, Idaho Code,], which deals with redemption of collateral;

(12) Section 28-9-624[, Idaho Code,], which deals with permissible waivers; and

(13) Sections 28-9-625 and 28-9-626[, Idaho Code,], which deal with the secured party's liability for failure to comply with this chapter.

History.

I.C., § 28-9-602, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-501(3).

2. **Waiver: In General.** Section 1-102(3) addresses which provisions of the UCC are mandatory and which may be varied by agreement. With exceptions relating to good faith, diligence, reasonableness, and care, immediate parties, as between themselves, may vary its provisions by agreement. However, in the context of rights and duties after default, our legal system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties. As stated in former Section 9-501, Comment 4, "no mortgage clause has ever been allowed to clog the equity of redemption." The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in

common sense. This section, like former Section 9-501(3), codifies this long-standing and deeply rooted attitude. The specified rights of the debtor and duties of the secured party may not be waived or varied except as stated. Provisions that are not specified in this section are subject to the general rules in Section 1-102(3).

3. **Nonwaivable Rights and Duties.** This section revises former Section 9-501(3) by restricting the ability to waive or modify additional specified rights and duties: (i) duties under Section 9-207(b)(4)(C), which deals with the use and operation of consumer goods, (ii) the right to a response to a request for an accounting, concerning a list of collateral, or concerning a statement of account (Section 9-210), (iii) the duty to collect collateral in a

commercially reasonable manner (Section 9-607), (iv) the implicit duty to refrain from a breach of the peace in taking possession of collateral under Section 9-609, (v) the duty to apply noncash proceeds of collection or disposition in a commercially reasonable manner (Sections 9-608 and 9-615), (vi) the right to a special method of calculating a surplus or deficiency in certain dispositions to a secured party, a person related to secured party, or a secondary obligor (Section 9-615), (vii) the duty to give an explanation of the calculation of a surplus or deficiency (Section 9-616), (viii) the right to limitations on the effectiveness of certain waivers (Section 9-624), and (ix) the right to hold a secured party liable for failure to comply with this Article (Sections 9-625 and 9-626). For clarity and consistency, this Article uses the term “waive or vary” instead of “renounc[e] or modify[],” which appeared in former Section 9-504(3).

This section provides generally that the specified rights and duties “may not be waived or varied.” However, it does not restrict the ability of parties to agree to settle, compromise, or renounce claims for past conduct that may have constituted a violation or breach of those rights and duties, even if the settlement involves an express “waiver.”

Section 9-610(c) limits the circumstances under which a secured party may purchase at its own private disposition. Transactions of this kind are equivalent to “strict foreclosures” and are governed by Sections 9-620, 9-621, and 9-622. The provisions of these sections can be waived only to the extent provided in Section 9-624(b). See Section 9-602.

4. Waiver by Debtors and Obligors. The restrictions on waiver contained in this section apply to obligors as well as debtors. This resolves a question under former Article 9 as to whether secondary obligors, assuming that they were “debtors” for purposes of former Part 5, were permitted to waive, under the law of suretyship, rights and duties under that Part.

5. Certain Post-Default Waivers. Section 9-624 permits post-default waivers in limited circumstances. These waivers must be made in agreements that are authenticated. Under Section 1-201, an “agreement” means the bargain of the parties in fact. In considering waivers under Section 9-624 and analogous agreements in other contexts, courts should carefully scrutinize putative agreements that appear in records that also address many additional or unrelated matters.

28-9-603. Agreement on standards concerning rights and duties.

— (a) The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in section 28-9-602[, Idaho Code,] if the standards are not manifestly unreasonable.

(b) Subsection (a) of this section does not apply to the duty under section 28-9-609[, Idaho Code,] to refrain from breaching the peace.

History.

I.C., § 28-9-603, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler’s Notes.

The bracketed insertions in subsections (a) and (b) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

Cited in: *Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc.* (In re Walter B. Scott & Sons, Inc.), 436 B.R. 582 (Bankr. D. Idaho 2010).

OFFICIAL COMMENT

1. Source. Former Section 9-501(3).
2. Limitation on Ability to Set Standards. Subsection (a), like former Section

9-501(3), permits the parties to set standards for compliance with the rights and duties under this Part if the standards are not

“manifestly unreasonable.” Under subsection (b), the parties are not permitted to set standards measuring fulfillment of the secured party’s duty to take collateral without breaching the peace.

28-9-604. Procedure if security agreement covers real property or fixtures. — (a) If a security agreement covers both personal and real property, a secured party may proceed:

- (1) Under this part as to the personal property without prejudicing any rights with respect to the real property; or
- (2) As to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply.

(b) Subject to subsection (c) of this section, if a security agreement covers goods that are or become fixtures, a secured party may proceed:

- (1) Under this part; or
- (2) In accordance with the rights with respect to real property, in which case the other provisions of this part do not apply.

(c) Subject to the other provisions of this part, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

(d) A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

History.
I.C., § 28-9-604, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates. that the act should take effect on and after
Section 31 of S.L. 2001, ch. 208 provided July 1, 2001.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Effect of foreclosure on realty.
Jurisdiction of district court.
Offset for failure of consideration.
Strict compliance with statute.
Summary foreclosure.
Venue.

Effect of Foreclosure on Realty. before resorting to foreclosure of the chattels,
A foreclosure of mortgage as to real estate, barred the right to foreclosure as to the chat-

tels, and this was true, notwithstanding the real estate failed to bring sufficient to liquidate the debt secured by the mortgage of real and personal property. *Brockman v. Caviness*, 61 Idaho 254, 100 P.2d 946 (1940).

Jurisdiction of District Court.

District court did not exceed its jurisdiction in appointing receiver and ordering sale of mortgaged property. *Skeen v. District Court*, 29 Idaho 331, 158 P. 1072 (1916).

Offset for Failure of Consideration.

A mortgagor was entitled to offset against his indebtedness the amount of damages resulting from a partial failure or lack of consideration for which the note was given. *West v. Prater*, 57 Idaho 583, 67 P.2d 273 (1937).

Strict Compliance With Statute.

Summary proceedings for the foreclosure of a chattel mortgage must be strictly followed

or the sale will be invalid. *Brockman v. Caviness*, 61 Idaho 254, 100 P.2d 946 (1940).

Summary Foreclosure.

Provisions of law relative to summary foreclosure of chattel mortgage must be strictly followed. *Garrett v. Soucie*, 46 Idaho 289, 267 P. 1078 (1928); *Peterson v. Hailey Nat'l Bank*, 51 Idaho 427, 6 P.2d 145 (1931).

Venue.

Particular statutes providing that venue in certain class of actions should be in certain county would prevail over general statute. *Berg v. Carey*, 40 Idaho 278, 232 P. 904 (1925).

Where action to foreclose chattel mortgage was brought in county where mortgaged chattel was situated, action was primarily one for foreclosure and venue would not be affected by fact that other relief was asked, which, if it were only relief sought, would be ground for changing venue. *Berg v. Carey*, 40 Idaho 278, 232 P. 904 (1925).

OFFICIAL COMMENT

1. **Source.** Former Sections 9-501(4), 9-313(8).

2. **Real-Property-Related Collateral.** The collateral in many transactions consists of both real and personal property. In the interest of simplicity, speed, and economy, subsection (a), like former Section 9-501(4), permits (but does not require) the secured party to proceed as to both real and personal property in accordance with its rights and remedies with respect to the real property. Subsection (a) also makes clear that a secured party who exercises rights under Part 6 with respect to personal property does not prejudice any rights under real-property law.

This Article does not address certain other real-property-related problems. In a number of States, the exercise of remedies by a creditor who is secured by both real property and non-real property collateral is governed by special legal rules. For example, under some anti-deficiency laws, creditors risk loss of rights against personal property collateral if they err in enforcing their rights against the real property. Under a "one-form-of-action" rule (or rule against splitting a cause of action), a creditor who judicially enforces a real property mortgage and does not proceed in the same action to enforce a security interest in personalty may (among other consequences) lose the right to proceed against the personalty. Although statutes of this kind

create impediments to enforcement of security interests, this Article does not override these limitations under other law.

3. **Fixtures.** Subsection (b) is new. It makes clear that a security interest in fixtures may be enforced either under real-property law or under any of the applicable provisions of Part 6, including sale or other disposition either before or after removal of the fixtures (see subsection (c)). Subsection (b) also serves to overrule cases holding that a secured party's only remedy after default is the removal of the fixtures from the real property. See, e.g., *Maplewood Bank & Trust v. Sears, Roebuck & Co.*, 625 A.2d 537 (N.J. Super. Ct. App. Div. 1993).

Subsection (c) generally follows former Section 9-313(8). It gives the secured party the right to remove fixtures under certain circumstances. A secured party whose security interest in fixtures has priority over owners and encumbrancers of the real property may remove the collateral from the real property. However, subsection (d) requires the secured party to reimburse any owner (other than the debtor) or encumbrancer for the cost of repairing any physical injury caused by the removal. This right to reimbursement is implemented by the last sentence of subsection (d), which gives the owner or encumbrancer a right to security or indemnity as a condition for giving permission to remove.

28-9-605. Unknown debtor or secondary obligor. — A secured party does not owe a duty based on its status as secured party:

- (1) To a person that is a debtor or obligor, unless the secured party knows:
- (A) That the person is a debtor or obligor;

- (B) The identity of the person; and
- (C) How to communicate with the person; or
- (2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:
 - (A) That the person is a debtor; and
 - (B) The identity of the person.

History.

I.C., § 28-9-605, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Effective Dates.**

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT**1. Source.** New.

2. Duties to Unknown Persons. This section relieves a secured party from duties owed to a debtor or obligor, if the secured party does not know about the debtor or obligor. Similarly, it relieves a secured party from duties owed to a secured party or lienholder who has filed a financing statement against the debtor, if the secured party does not know about the debtor. For example, a secured party may be unaware that the original debtor has sold the collateral subject to the security interest and that the new owner

has become the debtor. If so, the secured party owes no duty to the new owner (debtor) or to a secured party who has filed a financing statement against the new owner. This section should be read in conjunction with the exculpatory provisions in Section 9-628. Note that it relieves a secured party not only from duties arising under this Article but also from duties arising under other law by virtue of the secured party's status as such under this Article, unless the other law otherwise provides.

28-9-606. Time of default for agricultural lien. — For purposes of this part, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created.

History.

I.C., § 28-9-606, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Effective Dates.**

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT**1. Source.** New.

2. Time of Default. Remedies under this Part become available upon the debtor's "default." See Section 9-601. This section ex-

plains when "default" occurs in the agricultural-lien context. It requires one to consult the enabling statute to determine when the lienholder is entitled to enforce the lien.

28-9-607. Collection and enforcement by secured party. — (a) If so agreed, and in any event after default, a secured party:

- (1) May notify an account debtor or other person obligated on collateral to

make payment or otherwise render performance to or for the benefit of the secured party;

(2) May take any proceeds to which the secured party is entitled under section 28-9-315, Idaho Code;

(3) May enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(4) If it holds a security interest in a deposit account perfected by control under section 28-9-104(a)(1), Idaho Code, may apply the balance of the deposit account to the obligation secured by the deposit account; and

(5) If it holds a security interest in a deposit account perfected by control under section 28-9-104(a)(2) or (3), Idaho Code, may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) If necessary to enable a secured party to exercise, under subsection (a)(3) of this section, the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

(1) A copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) The secured party's sworn affidavit in recordable form stating that:

(A) a default has occurred with respect to the obligation secured by the mortgage; and

(B) the secured party is entitled to enforce the mortgage nonjudicially.

(c) A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) Undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) Is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) A secured party may deduct from the collections made pursuant to subsection (c) of this section reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

(e) This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party.

History.

I.C., § 28-9-607, as added by 2001, ch. 208,
§ 2, p. 704; am. 2012, ch. 145, § 19, p. 381.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 145, inserted "with respect to the obligation secured by the mortgage" in paragraph (b)(2)(A).

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

OFFICIAL COMMENT

1. **Source.** Former Section 9-502; subsections (b), (d), and (e) are new.

2. **Collections: In General.** Collateral consisting of rights to payment is not only the most liquid asset of a typical debtor's business but also is property that may be collected without any interruption of the debtor's business. This situation is far different from that in which collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore, problems of valuation and identification, present with collateral that is tangible personal property, frequently are not as serious in the case of rights to payment and other intangible collateral. Consequently, this section, like former Section 9-502, recognizes that financing through assignments of intangibles lacks many of the complexities that arise after default in other types of financing. This section allows the assignee to liquidate collateral by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "nonnotification" financing).

3. **Scope.** The scope of this section is broader than that of former Section 9-502. It applies not only to collections from account debtors and obligors on instruments but also to enforcement more generally against all persons obligated on collateral. It explicitly provides for the secured party's enforcement of the debtor's rights in respect of the account debtor's (and other third parties') obligations and for the secured party's enforcement of supporting obligations with respect to those obligations. (Supporting obligations are components of the collateral under Section 9-203(f).) The rights of a secured party under subsection (a) include the right to enforce claims that the debtor may enjoy against others. For example, the claims might include a breach-of-warranty claim arising out of a defect in equipment that is collateral or a secured party's action for an injunction against infringement of a patent that is collateral. Those claims typically would be proceeds of original collateral under Section 9-315.

4. **Collection and Enforcement Before Default.** Like Part 6 generally, this section deals with the rights and duties of secured parties following default. However, as did former Section 9-502 with respect to collection

rights, this section also applies to the collection and enforcement rights of secured parties even if a default has not occurred, as long as the debtor has so agreed. It is not unusual for debtors to agree that secured parties are entitled to collect and enforce rights against account debtors prior to default.

5. **Collections by Junior Secured Party.** A secured party who holds a security interest in a right to payment may exercise the right to collect and enforce under this section, even if the security interest is subordinate to a conflicting security interest in the same right to payment. Whether the junior secured party has priority in the collected proceeds depends on whether the junior secured party qualifies for priority as a purchaser of an instrument (e.g., the account debtor's check) under Section 9-330(d), as a holder in due course of an instrument under Sections 3-305 and 9-331(a), or as a transferee of money under Section 9-332(a). See Sections 9-330, Comment 7; 9-331, Comment 5; and 9-332.

6. **Relationship to Rights and Duties of Persons Obligated on Collateral.** This section permits a secured party to collect and enforce obligations included in collateral in its capacity as a secured party. It is not necessary for a secured party first to become the owner of the collateral pursuant to a disposition or acceptance. However, the secured party's rights, as between it and the debtor, to collect from and enforce collateral against account debtors and others obligated on collateral under subsection (a) are subject to Section 9-341, Part 4, and other applicable law. *Neither this section nor former Section 9-502 should be understood to regulate the duties of an account debtor or other person obligated on collateral.* Subsection (e) makes this explicit. For example, the secured party may be unable to exercise the debtor's rights under an instrument if the debtor is in possession of the instrument, or under a non-transferable letter of credit if the debtor is the beneficiary. Unless a secured party has control over a letter-of-credit right and is entitled to receive payment or performance from the issuer or a nominated person under Article 5, its remedies with respect to the letter-of-credit right may be limited to the recovery of any identifiable proceeds from the debtor. This section establishes only the baseline rights of the secured party *vis-a-vis* the debtor — the secured party is entitled to enforce and collect after default or earlier if so agreed.

7. Deposit Account Collateral. Subsections (a)(4) and (5) set forth the self-help remedy for a secured party whose collateral is a deposit account. Subsection (a)(4) addresses the rights of a secured party that is the bank with which the deposit account is maintained. That secured party automatically has control of the deposit account under Section 9-104(a)(1). After default, and otherwise if so agreed, the bank/secured party may apply the funds on deposit to the secured obligation.

If a security interest of a third party is perfected by control (Section 9-104(a)(2) or (a)(3)), then after default, and otherwise if so agreed, the secured party may instruct the bank to pay out the funds in the account. If the third party has control under Section 9-104(a)(3), the depository institution is obliged to obey the instruction because the secured party is its customer. See Section 4-401. If the third party has control under Section 9-104(a)(2), the control agreement determines the depository institution's obligation to obey.

If a security interest in a deposit account is unperfected, or is perfected by filing by virtue of the proceeds rules of Section 9-315, the depository institution ordinarily owes no obligation to obey the secured party's instructions. See Section 9-341. To reach the funds without the debtor's cooperation, the secured party must use an available judicial procedure.

8. Rights Against Mortgagor of Real Property. Subsection (b) addresses the situation in which the collateral consists of a mortgage note (or other obligation secured by a mortgage on real property). After the debtor's (mortgagee's) default, the secured party (assignee) may wish to proceed with a nonjudicial foreclosure of the mortgage securing the note but may be unable to do so because it has not become the assignee of record. The assignee/secured party may not have taken a recordable assignment at the commencement of the transaction (perhaps the mortgage note in question was one of hundreds assigned to the secured party as collateral). Having defaulted, the mortgagee may be unwilling to sign a recordable assignment. This section enables the secured party (assignee) to become the assignee of record by recording in the applicable real-property records the security agreement and an affidavit certifying default. Of course, the secured party's rights derive from those of its debtor.

Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.

9. Commercial Reasonableness. Subsection (c) provides that the secured party's collection and enforcement rights under subsection (a) must be exercised in a commercially reasonable manner. These rights include the right to settle and compromise claims against the account debtor. The secured party's failure to observe the standard of commercial reasonableness could render it liable to an aggrieved person under Section 9-625, and the secured party's recovery of a deficiency would be subject to Section 9-626. Subsection (c) does not apply if, as is characteristic of most sales of accounts, chattel paper, payment intangibles, and promissory notes, the secured party (buyer) has no right of recourse against the debtor (seller) or a secondary obligor. However, if the secured party does have a right of recourse, the commercial-reasonableness standard applies to collection and enforcement even though the assignment to the secured party was a "true" sale. The obligation to proceed in a commercially reasonable manner arises because the collection process affects the extent of the seller's recourse liability, not because the seller retains an interest in the sold collateral (the seller does not). Concerning classification of a transaction, see Section 9-109, Comment 4.

10. Attorney's Fees and Legal Expenses. The phrase "reasonable attorney's fees and legal expenses," which appears in subsection (d), includes only those fees and expenses incurred in proceeding against account debtors or other third parties. The secured party's right to recover these expenses from the collections arises automatically under this section. The secured party also may incur other attorney's fees and legal expenses in proceeding against the debtor or obligor.

Whether the secured party has a right to recover those fees and expenses depends on whether the debtor or obligor has agreed to pay them, as is the case with respect to attorney's fees and legal expenses under Sections 9-608(a)(1)(A) and 9-615(a)(1). The parties also may agree to allocate a portion of the secured party's overhead to collection and enforcement under subsection (d) or Section 9-608(a).

28-9-608. Application of proceeds of collection or enforcement — Liability for deficiency and right to surplus. — (a) If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash

proceeds of collection or enforcement under section 28-9-607[, Idaho Code,] in the following order to:

(A) the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(B) the satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) the satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed.

(2) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under subsection (1)(C) of this section.

(3) A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under section 28-9-607[, Idaho Code,] unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(4) A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency.

(b) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency.

History.

I.C., § 28-9-608, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in paragraphs (a)(1) and (a)(3) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

Deficiency.

A secured creditor is not barred from asserting a deficiency claim once collateral, in which they hold a purchase money security

interest, is surrendered. Under this section and the contract, the debtors are liable for any deficiency. In *re Trevett*, 2012 Bankr. LEXIS 5011 (Bankr. D. Idaho Oct. 24, 2012).

OFFICIAL COMMENT

1. **Source.** Subsection (a) is new; subsection (b) derives from former Section 9-502(2).

2. **Modifications of Prior Law.** Subsections (a) and (b) modify former Section 9-502(2) by explicitly providing for the appli-

cation of proceeds recovered by the secured party in substantially the same manner as provided in Section 9-615(a) and (e) for dispositions of collateral.

3. **Surplus and Deficiency.** Subsections

(a)(4) and (b) omit, as unnecessary, the references contained in former Section 9-502(2) to agreements varying the baseline rules on surplus and deficiency. The parties are always free to agree that an obligor will not be liable for a deficiency, even if the collateral secures an obligation, and that an obligor is liable for a deficiency, even if the transaction is a sale of receivables. For parallel provisions, see Section 9-615(d) and (e).

4. **Noncash Proceeds.** Subsection (a)(3) addresses the situation in which an enforcing secured party receives noncash proceeds.

Example: An enforcing secured party receives a promissory note from an account debtor who is unable to pay an account when it is due. The secured party accepts the note in exchange for extending the date on which the account debtor's obligation is due. The secured party may wish to credit its debtor (the assignor) with the principal amount of the note upon receipt of the note, but probably will prefer to credit the debtor only as and when the note is paid.

Under subsection (a)(3), the secured party is under no duty to apply the note or its value to the outstanding obligation unless its failure to do so would be commercially unreasonable. If the secured party does apply the note to the outstanding obligation, however, it must do so in a commercially reasonable manner. The parties may provide for the method of application of noncash proceeds by agreement, if the method is not manifestly unreasonable. See Section 9-603. This section does not explain when the failure to apply noncash proceeds would be commercially unreasonable; it leaves that determination to case-by-case adjudication. In the example, the secured party appears to have accepted the account debtor's note in order to increase the likelihood of payment and decrease the like-

lihood that the account debtor would dispute its obligation. Under these circumstances, it may well be commercially reasonable for the secured party to credit its debtor's obligations only as and when cash proceeds are collected from the account debtor, especially given the uncertainty that attends the account debtor's eventual payment. For an example of a secured party's receipt of noncash proceeds in which it may well be commercially unreasonable for the secured party to delay crediting its debtor's obligations with the value of noncash proceeds, see Section 9-615, Comment 3.

When the secured party is not required to "apply or pay over for application noncash proceeds," the proceeds nonetheless remain collateral subject to this Article. If the secured party were to dispose of them, for example, appropriate notification would be required (see Section 9-611), and the disposition would be subject to the standards provided in this Part (see Section 9-610). Moreover, a secured party in possession of the noncash proceeds would have the duties specified in Section 9-207.

5. **No Effect on Priority of Senior Security Interest.** The application of proceeds required by subsection (a) does not affect the priority of a security interest in collateral which is senior to the interest of the secured party who is collecting or enforcing collateral under Section 9-607. Although subsection (a) imposes a duty to apply proceeds to the enforcing secured party's expenses and to the satisfaction of the secured obligations owed to it and to subordinate secured parties, that duty applies only among the enforcing secured party and those persons. Concerning the priority of a junior secured party who collects and enforces collateral, see Section 9-607, Comment 5.

28-9-609. Secured party's right to take possession after default.

— (a) After default, a secured party:

- (1) May take possession of the collateral; and
- (2) Without removal, may render equipment unusable and dispose of collateral on a debtor's premises under section 28-9-610[, Idaho Code].

(b) A secured party may proceed under subsection (a) of this section:

- (1) Pursuant to judicial process; or
- (2) Without judicial process, if it proceeds without breach of the peace.

(c) If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

History.

I.C., § 28-9-609, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in paragraph (a)(2) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-503.

2. **Secured Party's Right to Possession.** This section follows former Section 9-503 and earlier uniform legislation. It provides that the secured party is entitled to take possession of collateral after default.

3. **Judicial Process; Breach of Peace.** Subsection (b) permits a secured party to proceed under this section without judicial process if it does so "without breach of the peace." Although former Section 9-503 placed the same condition on a secured party's right to take possession of collateral, subsection (b) extends the condition to the right provided in subsection (a)(2) as well. Like former Section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. In considering whether a secured party has engaged in a breach of the peace, however, courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of collateral.

This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer. A number of cases have held that a repossessing secured party's use of a law-enforcement officer without benefit of judicial process constituted a failure to comply with former Section 9-503.

4. **Damages for Breach of Peace.** Concerning damages that may be recovered based on a secured party's breach of the peace in connection with taking possession of collateral, see Section 9-625, Comment 3.

5. **Multiple Secured Parties.** More than one secured party may be entitled to take possession of collateral under this section. Conflicting rights to possession among secured parties are resolved by the priority rules of this Article. Thus, a senior secured party is entitled to possession as against a junior claimant. Non-UCC law governs whether a junior secured party in possession of collateral is liable to the senior in conver-

sion. Normally, a junior who refuses to relinquish possession of collateral upon the demand of a secured party having a superior possessory right to the collateral would be liable in conversion.

6. **Secured Party's Right to Disable and Dispose of Equipment on Debtor's Premises.** In the case of some collateral, such as heavy equipment, the physical removal from the debtor's plant and the storage of the collateral pending disposition may be impractical or unduly expensive. This section follows former Section 9-503 by providing that, in lieu of removal, the secured party may render equipment unusable or may dispose of collateral on the debtor's premises. Unlike former Section 9-503, however, this section explicitly conditions these rights on the debtor's default. Of course, this section does not validate unreasonable action by a secured party. Under Section 9-610, all aspects of a disposition must be commercially reasonable.

7. **Debtor's Agreement to Assemble Collateral.** This section follows former Section 9-503 also by validating a debtor's agreement to assemble collateral and make it available to a secured party at a place that the secured party designates. Similar to the treatment of agreements to permit collection prior to default under Section 9-607 and former 9-502, however, this section validates these agreements whether or not they are conditioned on the debtor's default. For example, a debtor might agree to make available to a secured party, from time to time, any instruments or negotiable documents that the debtor receives on account of collateral. A court should not infer from this section's validation that a debtor's agreement to assemble and make available collateral would not be enforceable under other applicable law.

8. **Agreed Standards.** Subject to the limitation imposed by Section 9-603(b), this section's provisions concerning agreements to assemble and make available collateral and a secured party's right to disable equipment and dispose of collateral on a debtor's premises are likely topics for agreement on standards as contemplated by Section 9-603.

28-9-610. Disposition of collateral after default. — (a) After default, a secured party may sell, lease, license or otherwise dispose of any or

all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one (1) or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) A secured party may purchase collateral:

(1) At a public disposition; or

(2) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

(d) A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

(e) A secured party may disclaim or modify warranties under subsection (d) of this section:

(1) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or

(2) By communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.

(f) A record is sufficient to disclaim warranties under subsection (e) of this section if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import.

History.

I.C., § 28-9-610, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after
July 1, 2001.

JUDICIAL DECISIONS

Commercially Reasonable.

The failure of a secured party to dispose of collateral in a commercially reasonable manner raises a rebuttable presumption that the fair market value of the collateral at the time of repossession was equal to the outstanding debt. *Aviation Fin. Group, LLC v. Duc Housing Partners, Inc.*, 2010 U.S. Dist. LEXIS 39007 (D. Idaho Apr. 20, 2010).

The obligation of commercial reasonableness in the disposition of collateral may not be "disclaimed" by agreement; however, parties

may determine by agreement the standards by which the fulfillment of commercial reasonableness is to be measured, if such standards are not manifestly unreasonable. In an adversary proceeding, the commercial reasonableness standards in the security agreement between the bankruptcy debtor and a creditor were, on their face, manifestly unreasonable under the UCC. *Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc.* (In re Walter B. Scott & Sons, Inc.), 436 B.R. 582 (Bankr. D. Idaho 2010).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Action for deficiency.
 Affidavit required.
 Application.
 Commercially reasonable sale.
 — Delay.
 Construction.
 Contest by creditor.
 Contest by trustee in bankruptcy.
 Determination of fair market value.
 Effect of failure to comply.
 Effect of foreclosure on realty.
 Evidence showing a void foreclosure.
 Exclusiveness of remedy.
 Finding supported by evidence.
 Foreclosure by notice and sale.
 Foreclosure where debt secured by both real and personal property.
 Impairment of contractual obligation.
 Injunction bond.
 Joinder of actions.
 Keeper's fees.
 Lessee's right to contest.
 Lien not waived.
 Machinery affixed to property.
 Mortgagee obtaining possession.
 Nature of action.
 Noncompliance as conversion.
 Notice to debtor.
 Offset for failure of consideration.
 Possession by assignee.
 Premature foreclosure as conversion.
 Prerequisites to action.
 Purchase at foreclosure sale.
 Recovery of deficiency.
 Removal, consent as to, not waiver.
 Repossession by finance company.
 Rights of junior mortgagee.
 Service of affidavit and notice.
 Sheriff protected.
 Strict compliance.
 Transfer of collateral.
 Void foreclosures.
 Waiver of notice.

Action for Deficiency.

Where there was deviation from compliance with provisions of the former section and property was sold by or through acts or procurement of mortgagee, he could not maintain action to collect deficiency. *First Nat'l Bank v. Poling*, 42 Idaho 636, 248 P. 19 (1926); *Gandiago v. Finch*, 46 Idaho 657, 270 P. 621 (1928); *Advance Rumley Thresher Co. v. Ayres*, 47 Idaho 514, 277 P. 20 (1929).

Where mortgagee, by his own illegal act, had deprived himself of his security, he could not maintain his action upon note or for any balance due on mortgage debt. *Garrett v. Soucie*, 46 Idaho 289, 267 P. 1078 (1928).

Affidavit Required.

A mortgagee who elected to avail himself of

the services of the sheriff to foreclose a chattel mortgage by notice and sale would place his affidavit and notice in the hands of the sheriff of the county wherein the mortgaged property was located, and not some other county. *Arens v. Scheele*, 63 Idaho 189, 119 P.2d 261 (1941).

Application.

Mortgage sale of property acquired by mortgagor subsequent to date of mortgage and mortgaged to another by unrecorded mortgage conveyed no title to purchaser. *Stoddard v. Ploeger*, 42 Idaho 688, 247 P. 791 (1926).

Commercially Reasonable Sale.

Failure to sell collateral within a commercially reasonable time may affect the secured party's claim for a deficiency judgment. *Nel-*

son v. Armstrong, 99 Idaho 422, 582 P.2d 1100 (1978).

Substantial compliance with the provisions of the UCC gives rise to a conclusive presumption that the sale of collateral held as security was conducted in a commercially reasonable manner; however, the reverse is not necessarily true. Failure to sell in a "recognized market" does not necessarily render the sale commercially unreasonable as a matter of law; rather, if the code criteria are not satisfied, the issue of commercial reasonableness becomes one of fact. *Tippett v. Bayman*, 105 Idaho 744, 672 P.2d 1074 (Ct. App. 1983).

Failure of the secured party to dispose of the repossessed collateral in a commercially reasonable manner or to give proper notice to the debtor raises a presumption that the fair market value of the collateral at the time of repossession was equal to the outstanding debt; however, where the secured party presented written estimates of the equipment's value from independent experts, and documented the costs incurred in repossessing and repairing the property to make its saleable, and where no contradicting evidence was submitted by the debtor, the presumption was rebutted. *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984).

Where there were material facts in dispute concerning the commercial reasonableness of the disposition, such as the effect of the lapse of time before disposition on the value of the collateral between the default and the sale, the reasons, if any, for the delay, the actual date of default, and the amount due under the contract, the order granting partial summary judgment was inappropriate. *CIT Fin. Servs. v. Herb's Indoor RV Ctr.*, 108 Idaho 820, 702 P.2d 858 (Ct. App. 1985).

Former section required a creditor who had taken possession of collateral to notify the debtor of the time after which a private sale will be conducted; failure to give proper notice of sale created a rebuttable presumption that the fair market value of the collateral at the time of repossession was equal to the outstanding debt. *Johnson Equip., Inc. v. Nielson*, 108 Idaho 867, 702 P.2d 905 (Ct. App. 1985).

—Delay.

No estoppel or waiver arises to bar a creditor merely because he has delayed in asserting his rights. *Erickson v. Marshall*, 115 Idaho 847, 771 P.2d 68 (Ct. App. 1989).

Merely passage of time in taking possession of collateral does not establish a commercially unreasonable delay. *Erickson v. Marshall*, 115 Idaho 847, 771 P.2d 68 (Ct. App. 1989).

The determination of whether delay is commercially unreasonable requires a consideration of all the surrounding circumstances,

including market conditions, the possible physical deterioration of the collateral, its economic deterioration through obsolescence, and the time required to assemble the collateral and prepare it for sale. *Erickson v. Marshall*, 115 Idaho 847, 771 P.2d 68 (Ct. App. 1989).

District court erred in concluding, as a matter of law, that the delay in taking possession of collateral waived any right assignee had; the issue of whether delay had caused a waiver of rights was a question of fact to be decided under the Uniform Commercial Code's standard of commercially reasonable time. *Erickson v. Marshall*, 115 Idaho 847, 771 P.2d 68 (Ct. App. 1989).

Construction.

Amendment enlarged remedy of mortgagee by giving him the power to foreclose without requiring services of an officer, if possession of property could be obtained peaceably, but did not deprive him of right to require the proper officer to foreclose. *Hudson v. Carlson*, 31 Idaho 196, 170 P. 100 (1918).

Contest by Creditor.

Attaching creditor could contest the validity of mortgage on which the foreclosure was based. *Blumauer-Frank Drug Co. v. Branstetter*, 4 Idaho 557, 43 P. 575 (1895).

In action to contest right to foreclose chattel mortgage, court was not authorized to order defendants to file original affidavit in mortgage foreclosure proceedings, unless it was made to appear that they had the affidavit in their possession and failed or refused to produce the same upon demand. *Murphy v. Russell*, 8 Idaho 133, 67 P. 421 (1901).

Judgment creditor and general creditors whose claims had been allowed in receivership suit could intervene in the foreclosure suit and contest validity of the mortgage so far as it covered personal property. *Equitable Trust Co. v. Great Shoshone & Twin Falls Water Power Co.*, 245 F. 697 (9th Cir. 1917), cert. denied, 247 U.S. 513, 38 S. Ct. 580, 62 L. Ed. 1243 (1918).

In a foreclosure suit it was within court's discretion whether creditor who had not availed himself of the right to intervene and contest mortgage should be allowed to set up a claim. *Equitable Trust Co. v. Great Shoshone & Twin Falls Water Power Co.*, 245 F. 697 (9th Cir. 1917), cert. denied, 247 U.S. 513, 38 S. Ct. 580, 62 L. Ed. 1243 (1918).

Contest by Trustee in Bankruptcy.

Trustee in bankruptcy in possession of mortgaged property and creditors whose claims he had allowed were "persons interested" under the former section. In re *Hickerson*, 162 F. 345 (D. Idaho 1908).

Determination of Fair Market Value.

Where creditor's premature resale of collateral violated the requirements of this section,

the creditor had the burden of proving that the actual fair market value of the collateral sold was less than the outstanding debt plus costs of repossessing, reconditioning and resale to establish its right to a deficiency judgment, and the trial court's denial of deficiency without any effort to determine fair market value was error. *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980).

If the secured party presents adequate proof of the market value of the collateral to rebut the presumption that it equalled the outstanding debt, then it is entitled to pursue the remainder of its judgment even if it did not comply with the notice and commercial reasonableness provisions of this section. *Butte County Bank v. Hogley*, 109 Idaho 402, 707 P.2d 513 (Ct. App. 1985).

Effect of Failure to Comply.

While it was duty of person conducting foreclosure sale to issue bill of sale to purchaser and transmit return of his proceedings on affidavit, failure to do both or either did not invalidate purchaser's title. *Gandiago v. Finch*, 46 Idaho 657, 270 P. 621 (1928).

A chattel mortgagee, who sold or procured the sale of the mortgaged property without complying with the statute relating to the summary foreclosure of chattel mortgages, could not maintain an action for a deficiency judgment. *Arens v. Scheele*, 63 Idaho 189, 119 P.2d 261 (1941).

A chattel mortgagee could not lawfully seize mortgage chattels in any other manner than that provided by statute relating to a foreclosure of chattel mortgages, and, if he sold such chattels in any other manner than that directed by the statute, he became liable to the mortgagor for conversion. *Arens v. Scheele*, 63 Idaho 189, 119 P.2d 261 (1941).

Effect of Foreclosure on Realty.

Under the former section and cognate legislation, a foreclosure of the mortgage as to real estate, before resorting to a foreclosure of the chattels, barred the right to foreclosure as to the chattels, and this was true notwithstanding the real estate failed to bring sufficient to liquidate the debt secured by the mortgage of real and personal property. *Brockman v. Caviness*, 61 Idaho 254, 100 P.2d 946 (1940).

Evidence Showing a Void Foreclosure.

Where a chattel mortgagee's agent removed the mortgaged property from the mortgagor's farm in another county to the mortgagee's place of business during the mortgagor's absence from his farm, and the mortgagee elected to foreclose by notice and sale, and the sheriff's return disclosed that the affidavit and notice of foreclosure were served on the mortgagee's agent in charge of the property,

and that the notices of sale were posted in the county of the mortgagee's residence, which was not the same as the county of the mortgagor's residence, and that the sale took place in such county, the statutes relating to foreclosure of chattel mortgages were not complied with, and the mortgagee was not entitled to a deficiency judgment against the mortgagor. *Arens v. Scheele*, 63 Idaho 189, 119 P.2d 261 (1941).

Exclusiveness of Remedy.

Where mortgagee sold property in any other manner than that directed by statute, he was guilty of conversion and became liable to mortgagor the same as anyone else who converts property. *Peterson v. Hailey Nat'l Bank*, 51 Idaho 427, 6 P.2d 145 (1931).

Finding Supported by Evidence.

Where the only evidence as to whether or not a mortgagee consented to a sale of the mortgaged property was that of the mortgagor and his agent, which was countervailed by the mortgagee, a finding that the mortgagee retained his lien was supported by such evidence. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933).

The plaintiff bank through its president intended to waive the lien of its mortgage, where a second bank of which the same person was president made a loan to a third party, who in turn loaned the money to the chattel mortgagor, and the bank president authorized the preparation of a bill of sale covering the chattels from the mortgagor to the third party containing a representation of the mortgagor's "lawful authority" to dispose of the mortgaged chattels. *Idaho Bank of Commerce v. Chastain*, 86 Idaho 146, 383 P.2d 849 (1963).

The burden of proof required by the former section was met by testimony of disinterested parties that, when asked by them concerning the right of the mortgagor to sell a quantity of alfalfa seed, the mortgagee replied that he had no lien upon the seed but had ample other security for the money due him. *Cook v. Western Field Seeds, Inc.*, 91 Idaho 675, 429 P.2d 407 (1967).

Foreclosure by Notice and Sale.

Under the former statute, a mortgagee had an option to foreclose his chattel mortgage by an action in the district court or by notice and sale, and if he elected to foreclose by notice and sale, he could demand and receive possession of the mortgaged property, if it could be taken peaceably; but if it could not be so taken or if he elected to do so without taking possession of the property, he could have the sheriff of the county or the constable of the precinct, wherein the property was located, take possession thereof and sell it in the

manner prescribed by law. *Arens v. Scheele*, 63 Idaho 189, 119 P.2d 261 (1941).

Foreclosure Where Debt Secured by Both Real and Personal Property.

Under a statute providing that, if a debt was secured by a mortgage on both real and personal property, all mortgages could be foreclosed in one action, or a chattel mortgage could first be foreclosed by notice and, if there was any balance unpaid, an action could be maintained for foreclosure of the real estate mortgage, an action to foreclose the chattel mortgage could not be maintained after foreclosure of the real estate mortgage securing the same debt, where the real estate did not sell for enough to pay the debt. *Brockman v. Caviness*, 61 Idaho 254, 100 P.2d 946 (1940).

Impairment of Contractual Obligation.

A statute attempting to enact that a mortgage is not enforceable after ten years from maturity of the debt secured thereby, or from date to which payment had been extended by agreement of record, in so far as it involved existing mortgages, constituted an impairment of the obligation of the contracts involved, so as to bring it within the inhibitions of Idaho Const., Art. I, § 10, and is, to that extent, unconstitutional in so far as applicable to such contracts. *Steward v. Nelson*, 54 Idaho 437, 32 P.2d 843 (1934).

Injunction Bond.

Bond or undertaking was required under the former section for issuance of injunction. *Wakefield v. Griffiths*, 45 Idaho 51, 261 P. 665 (1927).

Where temporary injunction was granted as ancillary to main relief and no attempt was made to dissolve or question it either by motion or on appeal, counsel fees and costs in connection therewith could not be recovered from sureties on injunction bond. *Wakefield v. Griffiths*, 45 Idaho 51, 261 P. 665 (1927).

Joinder of Actions.

Action to foreclose chattel mortgage could be joined with action against parties who were alleged to have converted part of the chattels and removed them from the county. *Berg v. Carey*, 40 Idaho 278, 232 P. 904 (1925).

Keeper's Fees.

Fact that contesting foreclosure made fees of keeper of property higher did not render his fees illegal or excessive. *South Side Live Stock Loan Co. v. Iverson*, 45 Idaho 499, 263 P. 481 (1928).

Lessee's Right to Contest.

Where in the absence of a lessee in possession of a mobile home, the seller and guarantor of promissory note took possession of the home and of lessee's personal belongings, the seller violated the lessee's property rights and

the lessee had a right to contest seller's action. *Thompson v. Dalton*, 95 Idaho 785, 520 P.2d 240 (1974).

Lien Not Waived.

Evidence was sufficient to show that the mortgagee did not consent to a sale of the mortgaged chattels, so as to waive his lien. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933).

Machinery Affixed to Property.

Where the small business administration held a security interest in fruit packing machinery under its real estate deed of trust which covered the real property to which the machinery was affixed, and where the SBA had purchased the entire interest of the original mortgagees of the property without knowledge of a purchase money security interest retained by the seller of the machinery, the SBA's interest was prior to the purchase money security interest. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

Mortgagee Obtaining Possession.

Where holder of chattel mortgage had obtained possession for purpose of foreclosure, subsequently attaching creditor could not defeat foreclosure proceedings because of insufficiency in affidavit or failure to file mortgage for record in county. *Largilliere Co. v. McConkie*, 36 Idaho 229, 210 P. 207 (1922).

Nature of Action.

The former section contemplated action in district court and authorized issuance of an injunction, but the action could be maintained without an injunction. *Murphy v. Russell*, 8 Idaho 133, 67 P. 421 (1901) (two cases).

Noncompliance as Conversion.

Sale at public auction of pledged collateral without substantial compliance with requirements of former statute amounted to conversion of such collateral. *Mechanics & Metals Nat'l Bank v. Pingree*, 40 Idaho 118, 232 P. 5 (1924).

Notice to Debtor.

Where the trial court found that the secured party had failed to give the debtors notice of its intended disposition of the collateral held as security as required, the trial court properly determined that because of this failure the debtors had the right to redeem all collateral not disposed of and to be paid for the "full total" of the collateral that was not returned or credited to them. *Tippett v. Bayman*, 105 Idaho 744, 672 P.2d 1074 (Ct. App. 1983).

Notice to the debtor is a separate requirement under this section which comes into play in the determination of commercial reasonableness; the purpose of notice is to pro-

tect the debtor's right of redemption. *Butte County Bank v. Hobley*, 109 Idaho 402, 707 P.2d 513 (Ct. App. 1985).

The rebuttable presumption approach to deficiency judgments requires the secured party in an action for a deficiency judgment to prove that it complied with the requirements of notice and commercial reasonableness. If not complied with, it will be presumed that the fair market value of the collateral at the time of repossession was equal to the debt, and this presumption, if unrebutted, will deny the secured party a deficiency judgment. *Butte County Bank v. Hobley*, 109 Idaho 402, 707 P.2d 513 (Ct. App. 1985).

Offset for Failure of Consideration.

A mortgagor was entitled to offset against his indebtedness the amount of damages resulting from a partial failure of lack of consideration for which the note was given. *West v. Prater*, 57 Idaho 583, 67 P.2d 273 (1937).

Possession by Assignee.

Where guarantor paid secured party for settled amount on principal's loan and received an assignment of secured party's interest, guarantor became an assignee with rights in principal's remaining equipment and guarantor was subrogated to secured party's rights; therefore, the court erred in concluding the assignment of the security interest to guarantor gave him no right to take possession of the collateral. *Erickson v. Marshall*, 115 Idaho 847, 771 P.2d 68 (Ct. App. 1989).

Premature Foreclosure as Conversion.

Where chattel mortgage was foreclosed by notice and sale when no legal right existed to do so, because debt was not yet due, cause of action in conversion arose. *Gunnell v. Largilliere Co.*, 46 Idaho 551, 269 P. 412 (1928).

Prerequisites to Action.

Action could not be maintained against officer for his neglect or refusal to take personal property into his possession under the former section, unless it was alleged and proved that mortgagee had exhausted his statutory remedy by demanding and failing to secure possession of chattels peaceably. *Tappin v. McCabe*, 27 Idaho 402, 149 P. 460 (1915).

Mortgagee was not required to make a demand upon mortgagor to turn over property peaceably before placing his affidavit in the hands of the proper officer, if mortgagor could not be found within the county. *Hudson v. Carlson*, 31 Idaho 196, 170 P. 100 (1918).

Only where peaceable possession of mortgaged property was refused, or all mortgagors were out of county where foreclosure occurred, could foreclosure proceedings be conducted by sheriff. *Advance Rumley Thresher*

Co. v. Ayres, 47 Idaho 514, 277 P. 20 (1929); *Standlee v. Hawley*, 51 Idaho 129, 4 P.2d 340 (1931); *Peterson v. Hailey Nat'l Bank*, 51 Idaho 427, 6 P.2d 145 (1931).

Failure to follow statute with respect to demanding peaceable possession before foreclosing was not cured by mortgagee himself paying sheriff's costs and charges on foreclosure and not deducting same from proceeds of sale. *Peterson v. Hailey Nat'l Bank*, 51 Idaho 427, 6 P.2d 145 (1931).

Purchase at Foreclosure Sale.

Although the seller of various items of fruit packing machinery had retained a security interest to secure the purchase price, a subsequent foreclosure sale of the real property to which the machinery was affixed discharged the security interest held by the seller of the machinery, where the purchase at the foreclosure sale of the real estate and fruit packing machinery was in good faith. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

An examination of the priority and foreclosure scheme of article 9 demonstrates that absence of knowledge of subordinate security interests could not be a prerequisite for a purchaser to buy property free of encumbrances at a foreclosure sale; for, if absence of knowledge were required, the party whose interest would be undermined would be the secured party who was conducting the sale. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

Recovery of Deficiency.

In suit to foreclose a chattel mortgage where the return of the sheriff showed a deficiency of some \$900, action to recover such amount in which details of such foreclosure sale and deficiency report were set out was properly brought. *Advance Thresher Co. v. Whiteside*, 3 Idaho 64, 26 P. 660 (1891).

Removal, Consent as to, Not Waiver.

Consent by a mortgagor that the mortgaged chattels be sold was not shown by granting consent for removal of such chattels. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933).

Repossession by Finance Company.

When a seller guarantees the underlying debt of a purchaser to a finance company, it is the seller who has the rights and duties of a secured party when the finance company repossesses collateral and transfers it to the seller pursuant to the purchase agreement or guaranty. *CIT Fin. Servs. v. Herb's Indoor RV Ctr., Inc.*, 118 Idaho 185, 795 P.2d 890 (Ct. App. 1990).

Rights of Junior Mortgagee.

A junior mortgagee could contest an usurious contract lien in the same manner as could the owner of the property. *United States Bldg.*

& Loan Ass'n v. Lanza, 47 Idaho 287, 274 P. 630 (1929).

Service of Affidavit and Notice.

Service of affidavit and notice was not required where person in possession was not mortgagor. *First Nat'l Bank v. Polling*, 42 Idaho 636, 248 P. 19 (1926).

Sheriff Protected.

Where affidavit and notice were regular in form, sheriff was bound to execute the same and would be protected in such execution without determining whether or not the mortgage on which the affidavit and notice were issued was valid. *Blumauer-Frank Drug Co. v. Branstetter*, 4 Idaho 557, 43 P. 575 (1895).

Strict Compliance.

The statutory provision relating to summary foreclosure of chattel mortgages had to be strictly followed. *Arens v. Scheele*, 63 Idaho 189, 119 P.2d 261 (1941).

A mortgagee could not lawfully seize mortgaged property in any other manner than that provided in former section; and when he sold it in any other manner than that directed by statute, he was guilty of conversion and became liable to the mortgagor, the same as anyone else who converted property to his

own use. *Adair v. Freeman*, 92 Idaho 773, 451 P.2d 519 (1969).

Transfer of Collateral.

A "transfer of collateral" occurs regardless of delivery of title. *CIT Fin. Servs. v. Herb's Indoor RV Ctr., Inc.*, 118 Idaho 185, 795 P.2d 890 (Ct. App. 1990).

Void Foreclosures.

Under the former statutory provisions requiring a chattel mortgage to be foreclosed in the county wherein the mortgaged property was located, and for the service of the affidavit and notice on the mortgagor if he could be found, or on the person having possession of the mortgaged property if the mortgagor could not be found, a removal of the property from the county by the mortgagee in order to thwart giving the mortgagor notice of foreclosure, or resulting in that, rendered the foreclosure void. *Arens v. Scheele*, 63 Idaho 189, 119 P.2d 261 (1941).

Waiver of Notice.

Where pledge agreement provided that certain notes may be sold at either public or private sale without advertisement or notice, waiver of notice applied only to provide sale and notice of public sale must have been given according to law. *Mechanics & Metals Nat'l Bank v. Pingree*, 40 Idaho 118, 232 P. 5 (1924).

RESEARCH REFERENCES

A.L.R. — Construction of term debtor as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation. 5 A.L.R.4th 1291.

Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC § 9-504(3). 11 A.L.R.4th 241.

Collateral which secured party may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3). 11 A.L.R.4th 1060.

OFFICIAL COMMENT

1. **Source.** Former Section 9-504(1), (3)

2. **Commercially Reasonable Dispositions.** Subsection (a) follows former Section 9-504 by permitting a secured party to dispose of collateral in a commercially reasonable manner following a default. Although subsection (b) permits both public and private dispositions, including public and private dispositions conducted over the Internet, "every aspect of a disposition . . . must be commercially reasonable." This section encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned. Subsection (a) does not restrict dispositions to sales; collateral may be sold, leased, licensed, or otherwise disposed. Section 9-627 provides guidance for determining the circumstances under which a disposition is "commercially reasonable."

3. **Time of Disposition.** This Article does not specify a period within which a secured party must dispose of collateral. This is consistent with this Article's policy to encourage private dispositions through regular commercial channels. It may, for example, be prudent not to dispose of goods when the market has collapsed. Or, it might be more appropriate to sell a large inventory in parcels over a period of time instead of in bulk. Of course, under subsection (b) every aspect of a disposition of collateral must be commercially reasonable. This requirement explicitly includes the "method, manner, time, place and other terms." For example, if a secured party does not proceed under Section 9-620 and holds collateral for a long period of time without disposing of it, and if there is no good reason for not making a prompt disposition, the secured party may be determined not to have

acted in a “commercially reasonable” manner. See also Section 1-203 (general obligation of good faith).

4. Pre-Disposition Preparation and Processing. Former Section 9-504(1) appeared to give the secured party the choice of disposing of collateral either “in its then condition or following any commercially reasonable preparation or processing.” Some courts held that the “commercially reasonable” standard of former Section 9-504(3) nevertheless could impose an affirmative duty on the secured party to process or prepare the collateral prior to disposition. Subsection (a) retains the substance of the quoted language. Although courts should not be quick to impose a duty of preparation or processing on the secured party, subsection (a) does not grant the secured party the right to dispose of the collateral “in its then condition” under *all* circumstances. A secured party may not dispose of collateral “in its then condition” when, taking into account the costs and probable benefits of preparation or processing and the fact that the secured party would be advancing the costs at its risk, it would be commercially unreasonable to dispose of the collateral in that condition.

5. Disposition by Junior Secured Party. Disposition rights under subsection (a) are not limited to first-priority security interests. Rather, any secured party as to whom there has been a default enjoys the right to dispose of collateral under this subsection. The exercise of this right by a secured party whose security interest is subordinate to that of another secured party does not of itself constitute a conversion or otherwise give rise to liability in favor of the holder of the senior security interest. Section 9-615 addresses application of the proceeds of a disposition by a junior secured party. Under Section 9-615(a), a junior secured party owes no obligation to apply the proceeds of disposition to the satisfaction of obligations secured by a senior security interest. Section 9-615(g) builds on this general rule by protecting certain juniors from claims of a senior concerning cash proceeds of the disposition. Even if a senior were to have a non-Article 9 claim to proceeds of a junior’s disposition, Section 9-615(g) would protect a junior that acts in good faith and without knowledge that its actions violate the rights of a senior party. Because the disposition by a junior would not cut off a senior’s security interest or other lien (see Section 9-617), in many (probably most) cases the junior’s receipt of the cash proceeds would not violate the rights of the senior.

The holder of a senior security interest is entitled, by virtue of its priority, to take possession of collateral from the junior secured party and conduct its own disposition, provided that the senior enjoys the right to

take possession of the collateral from the debtor. See Section 9-609. The holder of a junior security interest normally must notify the senior secured party of an impending disposition. See Section 9-611. Regardless of whether the senior receives a notification from the junior, the junior’s disposition does not of itself discharge the senior’s security interest. See Section 9-617. Unless the senior secured party has authorized the disposition free and clear of its security interest, the senior’s security interest ordinarily will survive the disposition by the junior and continue under Section 9-315(a). If the senior enjoys the right to repossess the collateral from the debtor, the senior likewise may recover the collateral from the transferee.

When a secured party’s collateral is encumbered by another security interest or other lien, one of the claimants may seek to invoke the equitable doctrine of marshaling. As explained by the Supreme Court, that doctrine “rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds.” *Meyer v. United States*, 375 U.S. 233, 236 (1963), quoting *Sowell v. Federal Reserve Bank*, 268 U.S. 449, 456-57 (1925). The purpose of the doctrine is “to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security.” *Id.* at 237. Because it is an equitable doctrine, marshaling “is applied only when it can be equitably fashioned as to all of the parties” having an interest in the property. *Id.* This Article leaves courts free to determine whether marshaling is appropriate in any given case. See Section 1-103.

6. Security Interests of Equal Rank. Sometimes two security interests enjoy the same priority. This situation may arise by contract, e.g., pursuant to “equal and ratable” provisions in indentures, or by operation of law. See Section 9-328(6). This Article treats a security interest having equal priority like a senior security interest in many respects. Assume, for example, that SP-X and SP-Y enjoy equal priority, SP-W is senior to them, and SP-Z is junior. If SP-X disposes of the collateral under this section, then (i) SP-W’s and SP-Y’s security interests survive the disposition but SP-Z’s does not, see Section 9-617, and (ii) neither SP-W nor SP-Y is entitled to receive a distribution of proceeds, but SP-Z is. See Section 9-615(a)(3).

When one considers the ability to obtain possession of the collateral, a secured party with equal priority is unlike a senior secured party. As the senior secured party, SP-W should enjoy the right to possession as against SP-X. See Section 9-609, Comment 5. If SP-W takes possession and disposes of the

collateral under this section, it is entitled to apply the proceeds to satisfy its secured claim. SP-Y, however, should not have such a right to take possession from SP-X; otherwise, once SP-Y took possession from SP-X, SP-X would have the right to get possession from SP-Y, which would be obligated to redeliver possession to SP-X, and so on. Resolution of this problem is left to the parties and, if necessary, the courts.

7. Public vs. Private Dispositions. This Part maintains two distinctions between "public" and other dispositions: (i) the secured party may buy at the former, but normally not at the latter (Section 9-610(c)), and (ii) the debtor is entitled to notification of "the time and place of a public disposition" and notification of "the time after which" a private disposition or other intended disposition is to be made (Section 9-613(1)(E)). It does not retain the distinction under former Section 9-504(4), under which transferees in a non-complying public disposition could lose protection more easily than transferees in other noncomplying dispositions. Instead, Section 9-617(b) adopts a unitary standard. Although the term is not defined, as used in this Article, a "public disposition" is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).

A secured party's purchase of collateral at its own private disposition is equivalent to a "strict foreclosure" and is governed by Sections 9-620, 9-621, and 9-622. The provisions of these sections can be waived only to the extent provided in Section 9-624(b). See Section 9-602.

8. Investment Property. Dispositions of investment property may be regulated by the federal securities laws. Although a "public" disposition of securities under this Article may implicate the registration requirements of the Securities Act of 1933, it need not do so. A disposition that qualifies for a "private placement" exemption under the Securities Act of 1933 nevertheless may constitute a "public" disposition within the meaning of this section. Moreover, the "commercially reasonable" requirements of subsection (b) need not prevent a secured party from conducting a foreclosure sale without the issuer's compliance with federal registration requirements.

9. "Recognized Market." A "recognized market," as used in subsection (c) and Section 9-611(d), is one in which the items sold are fungible and prices are not subject to individual negotiation. For example, the New York Stock Exchange is a recognized market. A market in which prices are individually nego-

tiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions.

10. Relevance of Price. While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable. Note also that even if the disposition is commercially reasonable, Section 9-615(f) provides a special method for calculating a deficiency or surplus if (i) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor, and (ii) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

11. Warranties. Subsection (d) affords the transferee in a disposition under this section the benefit of any title, possession, quiet enjoyment, and similar warranties that would have accompanied the disposition by operation of non-Article 9 law had the disposition been conducted under other circumstances. For example, the Article 2 warranty of title would apply to a sale of goods, the analogous warranties of Article 2A would apply to a lease of goods, and any common-law warranties of title would apply to dispositions of other types of collateral. See, e.g., Restatement (2d), Contracts § 333 (warranties of assignor).

Subsection (e) explicitly provides that these warranties can be disclaimed either under other applicable law or by communicating a record containing an express disclaimer. The record need not be written, but an oral communication would not be sufficient. See Section 9-102 (definition of "record"). Subsection (f) provides a sample of wording that will effectively exclude the warranties in a disposition under this section, whether or not the exclusion would be effective under non-Article 9 law.

The warranties incorporated by subsection (d) are those relating to "title, possession, quiet enjoyment, and the like." Depending on the circumstances, a disposition under this section also may give rise to other statutory or implied warranties, e.g., warranties of quality or fitness for purpose. Law other than this Article determines whether such other warranties apply to a disposition under this section. Other law also determines issues relating to disclaimer of such warranties. For example, a foreclosure sale of a car by a car dealer could give rise to an implied warranty of merchantability (Section 2-314) unless effectively disclaimed or modified (Section 2-316).

This section's approach to these warranties conflicts with the former Comment to Section 2-312. This Article rejects the baseline assumption that commercially reasonable dis-

positions under this section are out of the ordinary commercial course or peculiar. The Comment to Section 2-312 has been revised accordingly.

28-9-611. Notification before disposition of collateral. — (a) In this section, “notification date” means the earlier of the date on which:

(1) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or

(2) The debtor and any secondary obligor waive the right to notification.

(b) Except as otherwise provided in subsection (d) of this section, a secured party that disposes of collateral under section 28-9-610[, Idaho Code,] shall send to the persons specified in subsection (c) of this section a reasonable authenticated notification of disposition.

(c) To comply with subsection (b) of this section, the secured party shall send an authenticated notification of disposition to:

(1) The debtor;

(2) Any secondary obligor; and

(3) If the collateral is other than consumer goods:

(A) any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;

(B) any other secured party or lienholder that, ten (10) days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(i) identified the collateral;

(ii) was indexed under the debtor's name as of that date; and

(iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

(C) any other secured party that, ten (10) days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in section 28-9-311(a)[, Idaho Code].

(d) Subsection (b) of this section does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

(e) A secured party complies with the requirement for notification prescribed by subsection (c)(3)(B) of this section if:

(1) Not later than twenty (20) days or earlier than thirty (30) days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in subsection (c)(3)(B) of this section; and

(2) Before the notification date, the secured party:

(A) did not receive a response to the request for information; or

(B) received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

History.

I.C., § 28-9-611, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions in subsection (b) and paragraph (c)(3)(C) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-504(3).

2. **Reasonable Notification.** This section requires a secured party who wishes to dispose of collateral under Section 9-610 to send "a reasonable authenticated notification of disposition" to specified interested persons, subject to certain exceptions. The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content. See Sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

3. **Notification to Debtors and Secondary Obligors.** This section imposes a duty to send notification of a disposition not only to the debtor but also to any secondary obligor. Subsections (b) and (c) resolve an uncertainty under former Article 9 by providing that secondary obligors (sureties) are entitled to receive notification of an intended disposition of collateral, regardless of who created the security interest in the collateral. If the surety created the security interest, it would be the debtor. If it did not, it would be a secondary obligor. (This Article also resolves the question of the secondary obligor's ability to waive, pre-default, the right to notification-waiver generally is not permitted. See Section 9-602.) Section 9-605 relieves a secured party from any duty to send notification to a debtor or secondary obligor unknown to the secured party.

Under subsection (b), the principal obligor (borrower) is not always entitled to notification of disposition.

Example: Behnfeldt borrows on an unsecured basis, and Bruno grants a security interest in her car to secure the debt. Behnfeldt is a primary obligor, not a secondary obligor. As such, she is not entitled to notification of disposition under this section.

4. **Notification to Other Secured Parties.** Prior to the 1972 amendments to Article 9, former Section 9-504(3) required the enforcing secured party to send reasonable notification of the disposition:

except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral.

The 1972 amendments eliminated the duty to give notice to secured parties other than those from whom the foreclosing secured party had received written notice of a claim of an interest in the collateral.

Many of the problems arising from dispositions of collateral encumbered by multiple security interests can be ameliorated or solved by informing all secured parties of an intended disposition and affording them the opportunity to work with one another. To this end, subsection (c)(3)(B) expands the duties of the foreclosing secured party to include the duty to notify (and the corresponding burden of searching the files to discover) certain competing secured parties. The subsection imposes a search burden that in some cases may be greater than the pre-1972 burden on foreclosing secured parties but certainly is more modest than that faced by a new secured lender.

To determine who is entitled to notification, the foreclosing secured party must determine the proper office for filing a financing statement as of a particular date, measured by reference to the "notification date," as defined in subsection (a). This determination requires reference to the choice-of-law provisions of Part 3. The secured party must ascertain whether any financing statements covering the collateral and indexed under the debtor's name, as the name existed as of that date, in fact were filed in that office. The foreclosing secured party generally need not notify secured parties whose effective financing statements have become more difficult to locate because of changes in the location of the debtor, proceeds rules, or changes in the name that is sufficient as the name of the debtor under Section 9-503(a).

Under subsection (c)(3)(C), the secured party also must notify a secured party who has perfected a security interest by complying with a statute or treaty described in Section 9-311(a), such as a certificate-of-title statute.

Subsection (e) provides a “safe harbor” that takes into account the delays that may be attendant to receiving information from the public filing offices. It provides, generally, that the secured party will be deemed to have satisfied its notification duty under subsection (c)(3)(B) if it requests a search from the proper office at least 20 but not more than 30 days before sending notification to the debtor and if it also sends a notification to all secured parties (and other lienholders) reflected on the search report. The secured party’s duty under subsection (c)(3)(B) also will be satisfied if the secured party requests but does not receive a search report before the notification is sent to the debtor. Thus, if subsection (e) applies, a secured party who is entitled to notification under subsection (c)(3)(B) has no remedy against a foreclosing secured party who does not send the notification. The foreclosing secured party has complied with the notification requirement. Subsection (e) has no effect on the requirements of the other paragraphs of subsection (c). For example, if the foreclosing secured party received a notification from the holder of a conflicting security interest in accordance with subsection (c)(3)(A) but failed to send to the holder a notification of the disposition, the holder of the conflicting security interest would have the right to recover any loss under Section 9-625(b).

5. Authentication Requirement. Subsections (b) and (c) explicitly provide that a notification of disposition must be “authenticated.” Some cases read former Section 9-504(3) as validating oral notification.

6. Second Try. This Article leaves to judicial resolution, based upon the facts of each

case, the question whether the requirement of “reasonable notification” requires a “second try,” i.e., whether a secured party who sends notification and learns that the debtor did not receive it must attempt to locate the debtor and send another notification.

7. Recognized Market; Perishable Collateral. New subsection (d) makes it clear that there is no obligation to give notification of a disposition in the case of perishable collateral or collateral customarily sold on a recognized market (e.g., marketable securities). Former Section 9-504(3) might be read (incorrectly) to relieve the secured party from its duty to notify a debtor but not from its duty to notify other secured parties in connection with dispositions of such collateral.

8. Failure to Conduct Notified Disposition. Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change. This assumes, however, that the secured party acts in good faith, the revised notification is reasonable, and the revised plan for disposition and any attendant delay are commercially reasonable.

9. Waiver. A debtor or secondary obligor may waive the right to notification under this section only by a post-default authenticated agreement. See Section 9-624(a).

10. Other Law. Other State or federal law may contain requirements concerning notification of a disposition of property by a secured party. For example, federal law imposes notification requirements with respect to the enforcement of mortgages on federally documented vessels. Principles of statutory interpretation and, in the context of federal law, supremacy and preemption determine whether and to what extent law other than this Article supplements, displaces, or is displaced by this Article. See Sections 1-103, 1-104, 9-109(c)(1).

28-9-612. Timeliness of notification before disposition of collateral. — (a) Except as otherwise provided in subsection (b) of this section, whether a notification is sent within a reasonable time is a question of fact.

(b) A notification of disposition sent after default and ten (10) days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.

History.

I.C., § 28-9-612, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New.
2. **Reasonable Notification.** Section 9-611(b) requires the secured party to send a “reasonable authenticated notification.” Under that section, as under former Section 9-504(3), one aspect of a reasonable notification is its timeliness. This generally means that the notification must be sent at a reasonable time in advance of the date of a public disposition or the date after which a private disposition is to be made. A notification that is sent so near to the disposition date that a notified person could not be expected to act on or take account of the notification would be unreasonable.

3. **Timeliness of Notification: Safe Harbor.** The 10-day notice period in subsection (b) is intended to be a “safe harbor” and not a minimum requirement. To qualify for the “safe harbor” the notification must be sent after default. A notification also must be sent in a commercially reasonable manner. See Section 9-611(b) (“reasonable authenticated notification”). These requirements prevent a secured party from taking advantage of the “safe harbor” by, for example, giving the debtor a notification at the time of the original extension of credit or sending the notice by surface mail to a debtor overseas.

28-9-613. Contents and form of notification before disposition of collateral — General. — Except in a consumer goods transaction, the following rules apply:

- (1) The contents of a notification of disposition are sufficient if the notification:
 - (A) Describes the debtor and the secured party;
 - (B) Describes the collateral that is the subject of the intended disposition;
 - (C) States the method of intended disposition;
 - (D) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
 - (E) States the time and place of a public disposition or the time after which any other disposition is to be made.
- (2) Whether the contents of a notification that lacks any of the information specified in subsection (1) of this section are nevertheless sufficient is a question of fact.
- (3) The contents of a notification providing substantially the information specified in subsection (1) of this section are sufficient, even if the notification includes:
 - (A) Information not specified by subsection (1) of this section; or
 - (B) Minor errors that are not seriously misleading.
- (4) A particular phrasing of the notification is not required.
- (5) The following form of notification and the form appearing in section 28-9-614(3), when completed, each provides sufficient information:

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: (Name of debtor, obligor, or other person to which the notification is sent)

From: (Name, address, and telephone number of secured party).....

Name of Debtor(s):..... (Include only if debtor(s) are not an addressee).....

(For a public disposition:)

We will sell (or lease or license, as applicable) the (describe collateral) (to the highest qualified bidder) in public as follows:
Day and Date:
Time:
Place:

(For a private disposition:)

We will sell (or lease or license, as applicable) the (describe collateral)..... privately sometime after (day and date).....
You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell (or lease or license, as applicable) (for a charge of \$......). You may request an accounting by calling us at (telephone number).....

History.
I.C., § 28-9-613, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Effective Dates. that the act should take effect on and after
Section 31 of S.L. 2001, ch. 208 provided July 1, 2001.

OFFICIAL COMMENT

1. **Source.** New.
2. **Contents of Notification.** To comply with the “reasonable authenticated notification” requirement of Section 9-611(b), the contents of a notification must be reasonable. Except in a consumer-goods transaction, the contents of a notification that includes the information set forth in paragraph (1) are sufficient as a matter of law, unless the parties agree otherwise. (The reference to “time” of disposition means here, as it did in former Section 9-504(3), not only the hour of the day but also the date.) Although a secured party may choose to include additional information concerning the transaction or the debtor’s rights and obligations, no additional information is required unless the parties agree otherwise. A notification that lacks some of the information set forth in paragraph (1) nevertheless may be sufficient if found to be rea-

sonable by the trier of fact, under paragraph (2). A properly completed sample form of notification in paragraph (5) or in Section 9-614(a)(3) is an example of a notification that would contain the information set forth in paragraph (1). Under paragraph (4), however, no particular phrasing of the notification is required.
This section applies to a notification of a public disposition conducted electronically. A notification of an electronic disposition satisfies paragraph (1)(E) if it states the time when the disposition is scheduled to begin and states the electronic location. For example, under the technology current in 2010, the Uniform Resource Locator (URL) or other Internet address where the site of the public disposition can be accessed suffices as an electronic location.

28-9-614. Contents and form of notification before disposition of collateral — Consumer goods transaction. — In a consumer goods transaction, the following rules apply:
(1) A notification of disposition must provide the following information:
(A) The information specified in section 28-9-613(1)[, Idaho Code];

- (B) A description of any liability for a deficiency of the person to which the notification is sent;
 - (C) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under section 28-9-623[, Idaho Code,] is available; and
 - (D) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.
- (2) A particular phrasing of the notification is not required.
- (3) The following form of notification, when completed, provides sufficient information:

..... (Name and address of secured party).....
..... (Date).....

NOTICE OF OUR PLAN TO SELL PROPERTY

..... (Name and address of any obligor who is also a debtor).....
Subject: (Identification of Transaction)

We have your (describe collateral)....., because you broke promises in our agreement.

(For a public disposition:)

We will sell (describe collateral)..... at public sale. A sale could include a lease or license. The sale will be held as follows:

Date:

Time:

Place:

You may attend the sale and bring bidders if you want.

(For a private disposition:)

We will sell (describe collateral)..... at private sale sometime after (date)..... A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you (will or will not, as applicable)..... still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at (telephone number).....

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at (telephone number)..... (or write us at (secured party's address).....) and request a written explanation. (We will charge you \$...... for the explanation if we sent you another written explanation of the amount you owe us within the last six months.)

If you need more information about the sale call us at (telephone number)..... (or write us at (secured party's address).....). We are sending this notice to the following other people who have an interest in (describe collateral)..... or who owe money under your agreement: (Names of all other debtors and obligors, if any).....

(4) A notification in the form of subsection (3) of this section is sufficient, even if additional information appears at the end of the form.

(5) A notification in the form of subsection (3) of this section is sufficient, even if it includes errors in information not required by subsection (1) of this section, unless the error is misleading with respect to rights arising under this chapter.

(6) If a notification under this section is not in the form of subsection (3) of this section, law other than this chapter determines the effect of including information not required by subsection (1) of this section.

History.

I.C., § 28-9-614, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in paragraphs (1)(A) and (1)(C) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. Notification in Consumer-Goods Transactions. Paragraph (1) sets forth the information required for a reasonable notification in a consumer-goods transaction. A notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law. Compare Section 9-613(2), under which the trier of fact may find a notification to be sufficient even if it lacks some information listed in paragraph (1) of that section.

3. Safe-Harbor Form of Notification; Errors in Information. Although paragraph (2) provides that a particular phrasing of a notification is not required, paragraph (3) specifies a safe-harbor form that, when prop-

erly completed, satisfies paragraph (1). Paragraphs (4), (5), and (6) contain special rules applicable to erroneous and additional information. Under paragraph (4), a notification in the safe-harbor form specified in paragraph (3) is not rendered insufficient if it contains additional information at the end of the form. Paragraph (5) provides that non-misleading errors in information contained in a notification are permitted if the safe-harbor form is used *and if the errors are in information not required by paragraph (1)*. Finally, if a notification is in a form other than the paragraph (3) safe-harbor form, other law determines the effect of including in the notification information other than that required by paragraph (1).

28-9-615. Application of proceeds of disposition — Liability for deficiency and right to surplus. — (a) A secured party shall apply or pay over for application the cash proceeds of disposition under section 28-9-610[, Idaho Code,] in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(2) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) the secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

(B) in a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subsection (a)(3) of this section.

(c) A secured party need not apply or pay over for application noncash proceeds of disposition under section 28-9-610[, Idaho Code,] unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) of this section and permitted by subsection (c) of this section:

(1) Unless subsection (a)(4) of this section requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) The obligor is liable for any deficiency.

(e) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles or promissory notes:

(1) The debtor is not entitled to any surplus; and

(2) The obligor is not liable for any deficiency.

(f) The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) The transferee in the disposition is the secured party, a person related to the secured party or a secondary obligor; and

(2) The amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

- (1) Takes the cash proceeds free of the security interest or other lien;
- (2) Is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and
- (3) Is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

History.

I.C., § 28-9-615, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions in the introductory paragraph in (a) and in subsection (c) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS**Amount of Proceeds.**

Under § 28-9-626(e), if a surplus is calculated under subsection (f) of this section, the debtor has the burden of establishing that the amount of proceeds obtained from the disposition of collateral was significantly below the

amount a commercially reasonable disposition would have brought. *Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc.* (In re Walter B. Scott & Sons, Inc.), 436 B.R. 582 (Bankr. D. Idaho 2010).

OFFICIAL COMMENT

1. **Source.** Former Section 9-504(1), (2).

2. **Application of Proceeds.** This section contains the rules governing application of proceeds and the debtor's liability for a deficiency following a disposition of collateral. Subsection (a) sets forth the basic order of application. The proceeds are applied first to the expenses of disposition, second to the obligation secured by the security interest that is being enforced, and third, in the specified circumstances, to interests that are subordinate to that security interest.

Subsections (a) and (d) also address the right of a consignor to receive proceeds of a disposition by a secured party whose interest is senior to that of the consignor. Subsection (a) requires the enforcing secured party to pay excess proceeds first to subordinate secured parties or lienholders whose interests are senior to that of a consignor and, finally, to a consignor. Inasmuch as a consignor is the owner of the collateral, secured parties and lienholders whose interests are junior to the consignor's interest will not be entitled to any proceeds. In like fashion, under subsection (d)(1) the debtor is not entitled to a surplus when the enforcing secured party is required to pay over proceeds to a consignor.

3. **Noncash Proceeds.** Subsection (c) addresses the application of noncash proceeds of

a disposition, such as a note or lease. The explanation in Section 9-608, Comment 4, generally applies to this subsection.

Example: A secured party in the business of selling or financing automobiles takes possession of collateral (an automobile) following its debtor's default. The secured party decides to sell the automobile in a private disposition under Section 9-610 and sends appropriate notification under Section 9-611. After undertaking its normal credit investigation and in accordance with its normal credit policies, the secured party sells the automobile on credit, on terms typical of the credit terms normally extended by the secured party in the ordinary course of its business. The automobile stands as collateral for the remaining balance of the price. The noncash proceeds received by the secured party are chattel paper. The secured party may wish to credit its debtor (the assignor) with the principal amount of the chattel paper or may wish to credit the debtor only as and when the payments are made on the chattel paper by the buyer.

Under subsection (c), the secured party is under no duty to apply the noncash proceeds (here, the chattel paper) or their value to the secured obligation unless its failure to do so would be commercially unreasonable. If a secured party elects to apply the chattel paper

to the outstanding obligation, however, it must do so in a commercially reasonable manner. The facts in the example indicate that it would be commercially unreasonable for the secured party to fail to apply the value of the chattel paper to the original debtor's secured obligation. Unlike the example in Comment 4 to Section 9-608, the noncash proceeds received in this example are of the type that the secured party regularly generates in the ordinary course of its financing business in nonforeclosure transactions. The original debtor should not be exposed to delay or uncertainty in this situation. Of course, there will be many situations that fall between the examples presented in the Comment to Section 9-608 and in this Comment. This Article leaves their resolution to the court based on the facts of each case.

One would expect that where noncash proceeds are or may be material, the secured party and debtor would agree to more specific standards in an agreement entered into before or after default. The parties may agree to the method of application of noncash proceeds if the method is not manifestly unreasonable. See Section 9-603.

When the secured party is not required to "apply or pay over for application noncash proceeds," the proceeds nonetheless remain collateral subject to this Article. See Section 9-608, Comment 4.

4. Surplus and Deficiency. Subsection (d) deals with surplus and deficiency. It revises former Section 9-504(2) by imposing an explicit requirement that the secured party "pay" the debtor for any surplus, while retaining the secured party's duty to "account." Inasmuch as the debtor may not be an obligor, subsection (d) provides that the obligor (not the debtor) is liable for the deficiency. The special rule governing surplus and deficiency when receivables have been sold likewise takes into account the distinction between a debtor and an obligor. Subsection (d) also addresses the situation in which a consignor has an interest that is subordinate to the security interest being enforced.

5. Collateral Under New Ownership. When the debtor sells collateral subject to a security interest, the original debtor (creator of the security interest) is no longer a debtor inasmuch as it no longer has a property interest in the collateral; the buyer is the debtor. See Section 9-102. As between the debtor (buyer of the collateral) and the original debtor (seller of the collateral), the debtor (buyer) normally would be entitled to the surplus following a disposition. Subsection (d) therefore requires the secured party to pay the surplus to the debtor (buyer), not to the

original debtor (seller) with which it has dealt. But, because this situation typically arises as a result of the debtor's wrongful act, this Article does not expose the secured party to the risk of determining ownership of the collateral. If the secured party does not know about the buyer and accordingly pays the surplus to the original debtor, the exculpatory provisions of this Article exonerate the secured party from liability to the buyer. See Sections 9-605, 9-628(a), (b). If a debtor sells collateral free of a security interest, as in a sale to a buyer in ordinary course of business (see Section 9-320(a)), the property is no longer collateral and the buyer is not a debtor.

6. Certain "Low-Price" Dispositions. Subsection (f) provides a special method for calculating a deficiency or surplus when the secured party, a person related to the secured party (defined in Section 9-102), or a secondary obligor acquires the collateral at a foreclosure disposition. It recognizes that when the foreclosing secured party or a related party is the transferee of the collateral, the secured party sometimes lacks the incentive to maximize the proceeds of disposition. As a consequence, the disposition may comply with the procedural requirements of this Article (e.g., it is conducted in a commercially reasonable manner following reasonable notice) but nevertheless fetch a low price.

Subsection (f) adjusts for this lack of incentive. If the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought," then instead of calculating a deficiency (or surplus) based on the actual net proceeds, the calculation is based upon the amount that would have been received in a commercially reasonable disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor. Subsection (f) thus rejects the view that the secured party's receipt of such a price necessarily constitutes noncompliance with Part 6. However, such a price may suggest the need for greater judicial scrutiny. See Section 9-610, Comment 10.

7. "Person Related To." Section 9-102 defines "person related to." That term is a key element of the system provided in subsection (f) for low-price dispositions. One part of the definition applies when the secured party is an individual, and the other applies when the secured party is an organization. The definition is patterned closely on the corresponding definition in Section 1.301(32) of the Uniform Consumer Credit Code.

28-9-616. Explanation of calculation of surplus or deficiency. —

(a) In this section:

(1) “Explanation” means a writing that:

- (A) states the amount of the surplus or deficiency;
- (B) provides an explanation in accordance with subsection (c) of this section of how the secured party calculated the surplus or deficiency;
- (C) states, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and
- (D) provides a telephone number or mailing address from which additional information concerning the transaction is available.

(2) “Request” means a record:

- (A) authenticated by a debtor or consumer obligor;
- (B) requesting that the recipient provide an explanation; and
- (C) sent after disposition of the collateral under section 28-9-610[, Idaho Code].

(b) In a consumer goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under section 28-9-615[, Idaho Code], the secured party shall:

(1) Send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

- (A) before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and
- (B) within fourteen (14) days after receipt of a request; or

(2) In the case of a consumer obligor who is liable for a deficiency, within fourteen (14) days after receipt of a request, send to the consumer obligor a record waiving the secured party’s right to a deficiency.

(c) To comply with subsection (a)(1)(B) of this section, a writing must provide the following information in the following order:

(1) The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:

(A) if the secured party takes or receives possession of the collateral after default, not more than thirty-five (35) days before the secured party takes or receives possession; or

(B) if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than thirty-five (35) days before the disposition;

(2) The amount of proceeds of the disposition;

(3) The aggregate amount of the obligations after deducting the amount of proceeds;

(4) The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney’s fees secured by the collateral which are known to the secured party and relate to the current disposition;

(5) The amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1) of this subsection; and

(6) The amount of the surplus or deficiency.

(d) A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (a) of this section is sufficient, even if it includes minor errors that are not seriously misleading.

(e) A debtor or consumer obligor is entitled without charge to one (1) response to a request under this section during any six (6) month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to subsection (b)(1) of this section. The secured party may require payment of a charge not exceeding twenty-five dollars (\$25.00) for each additional response.

History.

I.C., § 28-9-616, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in paragraph (a)(2)(C) and in the introductory paragraph in (b) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New

2. Duty to Send Information Concerning Surplus or Deficiency. This section reflects the view that, in every consumer-goods transaction, the debtor or obligor is entitled to know the amount of a surplus or deficiency and the basis upon which the surplus or deficiency was calculated. Under subsection (b)(1), a secured party is obligated to provide this information (an "explanation," defined in subsection (a)(1)) no later than the time that it accounts for and pays a surplus or the time of its first written attempt to collect the deficiency. The obligor need not make a request for an accounting in order to receive an explanation. A secured party who does not attempt to collect a deficiency in writing or account for and pay a surplus has no obligation to send an explanation under subsection (b)(1) and, consequently, cannot be liable for noncompliance.

A debtor or secondary obligor need not wait until the secured party commences written collection efforts in order to receive an explanation of how a deficiency or surplus was calculated. Subsection (b)(1)(B) obliges the secured party to send an explanation within

14 days after it receives a "request" (defined in subsection (a)(2)).

3. Explanation of Calculation of Surplus or Deficiency. Subsection (c) contains the requirements for how a calculation of a surplus or deficiency must be explained in order to satisfy subsection (a)(1)(B). It gives a secured party some discretion concerning rebates of interest or credit service charges. The secured party may include these rebates in the aggregate amount of obligations secured, under subsection (c)(1), or may include them with other types of rebates and credits under subsection (c)(5). Rebates of interest or credit service charges are the only types of rebates for which this discretion is provided. If the secured party provides an explanation that includes rebates of pre-computed interest, its explanation must so indicate. The expenses and attorney's fees to be described pursuant to subsection (c)(4) are those relating to the most recent disposition, not those that may have been incurred in connection with earlier enforcement efforts and which have been resolved by the parties.

4. Liability for Noncompliance. A secured party who fails to comply with subsection (b)(2) is liable for any loss caused plus

\$500. See Section 9-625(b), (c), (e)(6). A secured party who fails to send an explanation under subsection (b)(1) is liable for any loss caused plus, if the noncompliance was “part of a pattern, or consistent with a practice of

noncompliance,” \$500. See Section 9-625(b), (c), (e)(5). However, a secured party who fails to comply with this section is not liable for statutory minimum damages under Section 9-625(c)(2). See Section 9-628(d).

28-9-617. Rights of transferee of collateral. — (a) A secured party’s disposition of collateral after default:

- (1) Transfers to a transferee for value all of the debtor’s rights in the collateral;
- (2) Discharges the security interest under which the disposition is made; and
- (3) Discharges any subordinate security interest or other subordinate lien.

(b) A transferee that acts in good faith takes free of the rights and interests described in subsection (a) of this section, even if the secured party fails to comply with this chapter or the requirements of any judicial proceeding.

(c) If a transferee does not take free of the rights and interests described in subsection (a) of this section, the transferee takes the collateral subject to:

- (1) The debtor’s rights in the collateral;
- (2) The security interest or agricultural lien under which the disposition is made; and
- (3) Any other security interest or other lien.

History.

I.C., § 28-9-617, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-504(4).

2. **Title Taken by Good-Faith Transferee.** Subsection (a) sets forth the rights acquired by persons who qualify under subsection (b) — transferees who act in good faith. Such a person is a “transferee,” inasmuch as a buyer at a foreclosure sale does not meet the definition of “purchaser” in Section 1-201 (the transfer is not, *vis-a-vis* the debtor, “voluntary”). By virtue of the expanded definition of the term “debtor” in Section 9-102, subsection (a) makes clear that the ownership interest of a person who bought the collateral subject to the security interest is terminated by a subsequent disposition under this Part. Such a person is a debtor under this Article. Under former Article 9, the result arguably was the same, but the statute was less clear. Under subsection (a), a disposition normally discharges the security interest being fore-

closed and any subordinate security interests and other liens.

A disposition has the effect specified in subsection (a), even if the secured party fails to comply with this Article. An aggrieved person (e.g., the holder of a subordinate security interest to whom a notification required by Section 9-611 was not sent) has a right to recover any loss under Section 9-625(b).

3. **Unitary Standard in Public and Private Dispositions.** Subsection (b) now contains a unitary standard that applies to transferees in both private and public dispositions — acting in good faith. However, this change from former Section 9-504(4) should not be interpreted to mean that a transferee acts in good faith even though it has knowledge of defects or buys in collusion, standards applicable to public dispositions under the former section. Properly understood, those standards

were specific examples of the absence of good faith.

4. Title Taken by Nonqualifying Transferee. Subsection (c) specifies the consequences for a transferee who does not qualify for protection under subsections (a) and (b)

(i.e., a transferee who does not act in good faith). The transferee takes subject to the rights of the debtor, the enforcing secured party, and other security interests or other liens.

28-9-618. Rights and duties of certain secondary obligors. —

(a) A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor:

- (1) Receives an assignment of a secured obligation from the secured party;
- (2) Receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party; or
- (3) Is subrogated to the rights of a secured party with respect to collateral.

(b) An assignment, transfer or subrogation described in subsection (a) of this section:

- (1) Is not a disposition of collateral under section 28-9-610[, Idaho Code]; and
- (2) Relieves the secured party of further duties under this chapter.

History.

I.C., § 28-9-618, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in paragraph (b)(1) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-504(5).

2. **Scope of This Section.** Under this section, assignments of secured obligations and other transactions (regardless of form) that function like assignments of secured obligations are not dispositions to which Part 6 applies. Rather, they constitute assignments of rights and (occasionally) delegations of duties. Application of this section may require an investigation into the agreement of the parties, which may not be reflected in the words of the repurchase agreement (e.g., when the agreement requires a recourse party to "purchase the collateral" but contemplates that the purchaser will then conduct an Article 9 foreclosure disposition).

This section, like former Section 9-504(5), does not constitute a general and comprehensive rule for allocating rights and duties upon assignment of a secured obligation. Rather, it applies only in situations involving a secondary obligor described in subsection (a). In other contexts, the agreement of the parties

and applicable law other than Article 9 determine whether the assignment imposes upon the assignee any duty to the debtor and whether the assignor retains its duties to the debtor after the assignment.

Subsection (a)(1) applies when there has been an assignment of an obligation that is secured at the time it is assigned. Thus, if a secondary obligor acquires the collateral at a disposition under Section 9-610 and simultaneously or subsequently discharges the unsecured deficiency claim, subsection (a)(1) is not implicated. Similarly, subsection (a)(3) applies only when the secondary obligor is subrogated to the secured party's rights with respect to collateral. Thus, this subsection will not be implicated if a secondary obligor discharges the debtor's unsecured obligation for a post-disposition deficiency. Similarly, if the secured party disposes of some of the collateral and the secondary obligor thereafter discharges the remaining obligation, subsection (a) applies only with respect to rights

and duties concerning the remaining collateral, and, under subsection (b), the subrogation is not a disposition of the remaining collateral.

As discussed more fully in Comment 3, a secondary obligor may receive a transfer of collateral in a disposition under Section 9-610 in exchange for a payment that is applied against the secured obligation. However, a secondary obligor who pays and receives a transfer of collateral does not necessarily become subrogated to the rights of the secured party as contemplated by subsection (a)(3). Only to the extent the secondary obligor makes a payment in satisfaction of its secondary obligation would it become subrogated. To the extent its payment constitutes the price of the collateral in a Section 9-610 disposition by the secured party, the secondary obligor would not be subrogated. Thus, if the amount paid by the secondary obligor for the collateral in a Section 9-610 disposition is itself insufficient to discharge the secured obligation, but the secondary obligor makes an additional payment that satisfies the remaining balance, the secondary obligor would be subrogated to the secured party's deficiency claim. However, the duties of the secured party *as such* would have come to an end with respect to that collateral. In some situations the capacity in which the payment is made may be unclear. Accordingly, the parties should in their relationship provide clear evidence of the nature and circumstances of the payment by the secondary obligor.

3. Transfer of Collateral to Secondary Obligor. It is possible for a secured party to transfer collateral to a secondary obligor in a transaction that is a disposition under Section 9-610 and that establishes a surplus or

deficiency under Section 9-615. Indeed, this Article includes a special rule, in Section 9-615(f), for establishing a deficiency in the case of some dispositions to, *inter alia*, secondary obligors. This Article rejects the view, which some may have ascribed to former Section 9-504(5), that a transfer of collateral to a recourse party can never constitute a disposition of collateral which discharges a security interest. Inasmuch as a secured party could itself buy collateral at its own public sale, it makes no sense to prohibit a recourse party ever from buying at the sale.

4. Timing and Scope of Obligations.

Under subsection (a), a recourse party acquires rights and incurs obligations only "after" one of the specified circumstances occurs. This makes clear that when a successor assignee, transferee, or subrogee becomes obligated it does not assume any liability for earlier actions or inactions of the secured party whom it has succeeded unless it agrees to do so. Once the successor becomes obligated, however, it is responsible for complying with the secured party's duties thereafter. For example, if the successor is in possession of collateral, then it has the duties specified in Section 9-207.

Under subsection (b), the same event (assignment, transfer, or subrogation) that gives rise to rights to, and imposes obligations on, a successor relieves its predecessor of any further duties under this Article. For example, if the security interest is enforced after the secured obligation is assigned, the assignee — but not the assignor — has the duty to comply with this Part. Similarly, the assignment does not excuse the assignor from liability for failure to comply with duties that arose before the event or impose liability on the assignee for the assignor's failure to comply.

28-9-619. Transfer of record or legal title. — (a) In this section, "transfer statement" means a record authenticated by a secured party stating:

- (1) That the debtor has defaulted in connection with an obligation secured by specified collateral;
- (2) That the secured party has exercised its postdefault remedies with respect to the collateral;
- (3) That, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and
- (4) The name and mailing address of the secured party, debtor and transferee.

(b) A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate of title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office shall:

- (1) Accept the transfer statement;
- (2) Promptly amend its records to reflect the transfer; and
- (3) If applicable, issue a new appropriate certificate of title in the name of the transferee.

(c) A transfer of the record or legal title to collateral to a secured party under subsection (b) of this section or otherwise is not of itself a disposition of collateral under this chapter and does not of itself relieve the secured party of its duties under this chapter.

History.

I.C., § 28-9-619, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. Transfer of Record or Legal Title.

Potential buyers of collateral that is covered by a certificate of title (e.g., an automobile) or is subject to a registration system (e.g., a copyright) typically require as a condition of their purchase that the certificate or registry reflect their ownership. In many cases, this condition can be met only with the consent of the record owner. If the record owner is the debtor and, as may be the case after the default, the debtor refuses to cooperate, the secured party may have great difficulty disposing of the collateral.

Subsection (b) provides a simple mechanism for obtaining record or legal title, for use primarily when other law does not provide one. Of course, use of this mechanism will not be effective to clear title to the extent that subsection (b) is preempted by federal law. Subsection (b) contemplates a transfer of record or legal title to a third party, following a secured party's exercise of its disposition or

acceptance remedies under this Part, as well as a transfer by a debtor to a secured party prior to the secured party's exercise of those remedies. Under subsection (c), a transfer of record or legal title (under subsection (b) or under other law) to a secured party prior to the exercise of those remedies merely puts the secured party in a position to pass legal or record title to a transferee at foreclosure. A secured party who has obtained record or legal title retains its duties with respect to enforcement of its security interest, and the debtor retains its rights as well.

3. Title-Clearing Systems Under Other Law. Applicable non-UCC law (e.g., a certificate-of-title statute, federal registry rules, or the like) may provide a means by which the secured party may obtain or transfer record or legal title for the purpose of a disposition of the property under this Article. The mechanism provided by this section is in addition to any title-clearing provision under law other than this Article.

28-9-620. Acceptance of collateral in full or partial satisfaction of obligation — Compulsory disposition of collateral. — (a) A secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

- (1) The debtor consents to the acceptance under subsection (c) of this section;
- (2) The secured party does not receive, within the time set forth in subsection (d) of this section, a notification of objection to the proposal authenticated by:

(A) a person to which the secured party was required to send a proposal under section 28-9-621[, Idaho Code]; or

(B) any other person, other than the debtor, holding an interest in the

collateral subordinate to the security interest that is the subject of the proposal; and

(3) Subsection (e) of this section does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to section 28-9-624[, Idaho Code].

(b) A purported or apparent acceptance of collateral under this section is ineffective unless:

(1) The secured party consents to the acceptance in an authenticated record or sends a proposal to the debtor; and

(2) The conditions of subsection (a) of this section are met.

(c) For purposes of this section:

(1) A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default; and

(2) A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default or the secured party:

(A) sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

(B) in the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

(C) does not receive a notification of objection authenticated by the debtor within twenty (20) days after the proposal is sent.

(d) To be effective under subsection (a)(2) of this section, a notification of objection must be received by the secured party:

(1) In the case of a person to which the proposal was sent pursuant to section 28-9-621[, Idaho Code], within twenty (20) days after notification was sent to that person; and

(2) In other cases:

(A) within twenty (20) days after the last notification was sent pursuant to section 28-9-621[, Idaho Code]; or

(B) if a notification was not sent, before the debtor consents to the acceptance under subsection (c) of this section.

(e) A secured party that has taken possession of collateral shall dispose of the collateral pursuant to section 28-9-610[, Idaho Code,] within the time specified in subsection (f) of this section if:

(1) Sixty percent (60%) of the cash price has been paid in the case of a purchase-money security interest in consumer goods; or

(2) Sixty percent (60%) of the principal amount of the obligation secured has been paid in the case of a nonpurchase-money security interest in consumer goods.

(f) To comply with subsection (e) of this section, the secured party shall dispose of the collateral:

(1) Within ninety (90) days after taking possession; or

(2) Within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default.

History.

I.C., § 28-9-620, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions in subsection (a), (d), and (e) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS**ANALYSIS**

Application.

Burden of proof.

Calculation of damages.

Construction.

Inferences.

Notice to debtor.

Purpose.

Application.

While undue delay in reselling may affect a creditor's claim for a deficiency, this result would not ordinarily flow from this section. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Burden of Proof.

While the proverbial meeting of the minds is not essential under this section, a debtor seeking to avail himself of the statute's reciprocal protections must still establish that the secured party intended to retain the collateral in lieu of selling it for the debtor's account. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Calculation of Damages.

Where the court determines that the creditor is not entitled to any deficiency, it should calculate the debtor's damages for the fraud without regard to the unpaid balance on the contract; if, on the other hand, the court finds that the creditor is entitled to some deficiency, the court should nevertheless calculate the creditor's deficiency and the debtor's fraud damages separately. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Construction.

While strict compliance with the written notice provisions of this section may not be essential where the debtor is claiming that the secured party has retained the collateral,

the creditor must in some way have manifested an intent to accept the collateral in full satisfaction of the debtor's obligation. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Inferences.

Mere failure for four and a half months to pursue resale of heavy equipment is not a basis for inferring the necessary intent on the creditor's part to keep the collateral. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

Notice to Debtor.

Where the trial court found that the secured party had failed to give the debtors notice of its intended disposition of the collateral held as security as required, the trial court properly determined that because of this failure the debtors had the right to redeem all collateral not disposed of and to be paid for the "full total" of the collateral that was not returned or credited to them. *Tippett v. Bayman*, 105 Idaho 744, 672 P.2d 1074 (Ct. App. 1983).

Purpose.

This section is not a device for policing the conduct of secured parties vis-à-vis their debtors, but rather a statutory analogue to the common law concept of accord and satisfaction. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978).

OFFICIAL COMMENT

1. **Source.** Former Section 9-505.

2. **Overview.** This section and the two sections following deal with strict foreclosure,

a procedure by which the secured party acquires the debtor's interest in the collateral without the need for a sale or other disposi-

tion under Section 9-610. Although these provisions derive from former Section 9-505, they have been entirely reorganized and substantially rewritten. The more straightforward approach taken in this Article eliminates the fiction that the secured party always will present a “proposal” for the retention of collateral and the debtor will have a fixed period to respond. By eliminating the need (but preserving the possibility) for proceeding in that fashion, this section eliminates much of the awkwardness of former Section 9-505. It reflects the belief that strict foreclosures should be encouraged and often will produce better results than a disposition for all concerned.

Subsection (a) sets forth the conditions necessary to an effective acceptance (formerly, retention) of collateral in full or partial satisfaction of the secured obligation. Section 9-621 requires in addition that a secured party who wishes to proceed under this section notify certain other persons who have or claim to have an interest in the collateral. Unlike the failure to meet the conditions in subsection (a), under Section 9-622(b) the failure to comply with the notification requirement of Section 9-621 does not render the acceptance of collateral ineffective. Rather, the acceptance can take effect notwithstanding the secured party’s noncompliance. A person to whom the required notice was not sent has the right to recover damages under Section 9-625(b). Section 9-622(a) sets forth the effect of an acceptance of collateral.

3. Conditions to Effective Acceptance. Subsection (a) contains the conditions necessary to the effectiveness of an acceptance of collateral. Subsection (a)(1) requires the debtor’s consent. Under subsections (c)(1) and (c)(2), the debtor may consent by agreeing to the acceptance in writing after default. Subsection (c)(2) contains an alternative method by which to satisfy the debtor’s-consent condition in subsection (a)(1). It follows the proposal-and-objection model found in former Section 9-505: The debtor consents if the secured party sends a proposal to the debtor and does not receive an objection within 20 days. Under subsection (c)(1), however, that silence is not deemed to be consent with respect to acceptances in partial satisfaction. Thus, a secured party who wishes to conduct a “partial strict foreclosure” must obtain the debtor’s agreement in a record authenticated after default. In all other respects, the conditions necessary to an effective partial strict foreclosure are the same as those governing acceptance of collateral in full satisfaction. (But see subsection (g), prohibiting partial strict foreclosure of a security interest in consumer transactions.)

The time when a debtor consents to a strict foreclosure is significant in several circum-

stances under this section and the following one. See Sections 9-620(a)(1), (d)(2), 9-621(a)(1), (a)(2), (a)(3). For purposes of determining the time of consent, a debtor’s conditional consent constitutes consent. Subsection (a)(2) contains the second condition to the effectiveness of an acceptance under this section — the absence of a timely objection from a person holding a junior interest in the collateral or from a secondary obligor. Any junior party — secured party or lienholder — is entitled to lodge an objection to a proposal, even if that person was not entitled to notification under Section 9-621. Subsection (d), discussed below, indicates when an objection is timely.

Subsections (a)(3) and (a)(4) contain special rules for transactions in which consumers are involved. See Comment 12.

4. Proposals. Section 9-102 defines the term “proposal.” It is necessary to send a “proposal” to the debtor only if the debtor does not agree to an acceptance in an authenticated record as described in subsection (c)(1) or (c)(2). Section 9-621(a) determines whether it is necessary to send a proposal to third parties. A proposal need not take any particular form as long as it sets forth the terms under which the secured party is willing to accept collateral in satisfaction. A proposal to accept collateral should specify the amount (or a means of calculating the amount, such as by including a per diem accrual figure) of the secured obligations to be satisfied, state the conditions (if any) under which the proposal may be revoked, and describe any other applicable conditions. Note, however, that a conditional proposal generally requires the debtor’s agreement in order to take effect. See subsection (c).

5. Secured Party’s Agreement; No “Constructive” Strict Foreclosure. The conditions of subsection (a) relate to actual or implied consent by the debtor and any secondary obligor or holder of a junior security interest or lien. To ensure that the debtor cannot unilaterally cause an acceptance of collateral, subsection (b) provides that compliance with these conditions is necessary but not sufficient to cause an acceptance of collateral. Rather, under subsection (b), acceptance does not occur unless, in addition, the secured party consents to the acceptance in an authenticated record or sends to the debtor a proposal. For this reason, a mere delay in collection or disposition of collateral does not constitute a “constructive” strict foreclosure. Instead, delay is a factor relating to whether the secured party acted in a commercially reasonable manner for purposes of Section 9-607 or 9-610. A debtor’s voluntary surrender of collateral to a secured party and the secured party’s acceptance of possession of the collateral does not, of itself, necessarily raise

an implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation under this section.

6. When Acceptance Occurs. This section does not impose any formalities or identify any steps that a secured party must take in order to accept collateral once the conditions of subsections (a) and (b) have been met. Absent facts or circumstances indicating a contrary intention, the fact that the conditions have been met provides a sufficient indication that the secured party has accepted the collateral on the terms to which the secured party has consented or proposed and the debtor has consented or failed to object. Following a proposal, acceptance of the collateral normally is automatic upon the secured party's becoming bound and the time for objection passing. As a matter of good business practice, an enforcing secured party may wish to memorialize its acceptance following a proposal, such as by notifying the debtor that the strict foreclosure is effective or by placing a written record to that effect in its files. The secured party's agreement to accept collateral is self-executing and cannot be breached. The secured party is bound by its agreement to accept collateral and by any proposal to which the debtor consents.

7. No Possession Requirement. This section eliminates the requirement in former Section 9-505 that the secured party be "in possession" of collateral. It clarifies that intangible collateral, which cannot be possessed, may be subject to a strict foreclosure under this section. However, under subsection (a)(3), if the collateral is consumer goods, acceptance does not occur unless the debtor is not in possession.

8. When Objection Timely. Subsection (d) explains when an objection is timely and thus prevents an acceptance of collateral from taking effect. An objection by a person to which notification was sent under Section 9-621 is effective if it is received by the secured party within 20 days from the date the notification was sent to that person. Other objecting parties (i.e., third parties who are not entitled to notification) may object at any time within 20 days after the last notification is sent under Section 9-621. If no such notification is sent, third parties must object before the debtor agrees to the acceptance in writing or is deemed to have consented by silence. The former may occur any time after default, and the latter requires a 20-day waiting period. See subsection (c).

9. Applicability of Other Law. This section does not purport to regulate all aspects of the transaction by which a secured party may become the owner of collateral previously owned by the debtor. For example, a secured party's acceptance of a motor vehicle in satis-

faction of secured obligations may require compliance with the applicable motor vehicle certificate-of-title law. State legislatures should conform those laws so that they mesh well with this section and Section 9-610, and courts should construe those laws and this section harmoniously. A secured party's acceptance of collateral in the possession of the debtor also may implicate statutes dealing with a seller's retention of possession of goods sold.

10. Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes. If the collateral is accounts, chattel paper, payment intangibles, or promissory notes, then a secured party's acceptance of the collateral in satisfaction of secured obligations would constitute a sale to the secured party. That sale normally would give rise to a new security interest (the ownership interest) under Sections 1-201(37) and 9-109. In the case of accounts and chattel paper, the new security interest would remain perfected by a filing that was effective to perfect the secured party's original security interest. In the case of payment intangibles or promissory notes, the security interest would be perfected when it attaches. See Section 9-309. However, the procedures for acceptance of collateral under this section satisfy all necessary formalities and a new security agreement authenticated by the debtor would not be necessary.

11. Role of Good Faith. Section 1-304 imposes an obligation of good faith on a secured party's enforcement under this Article. This obligation may not be disclaimed by agreement. See Section 1-302. Thus, a proposal and acceptance made under this section in bad faith would not be effective. For example, a secured party's proposal to accept marketable securities worth \$1,000 in full satisfaction of indebtedness in the amount of \$100, made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith. On the other hand, in the normal case proposals and acceptances should be not second-guessed on the basis of the "value" of the collateral involved. Disputes about valuation or even a clear excess of collateral value over the amount of obligations satisfied do not necessarily demonstrate the absence of good faith.

12. Special Rules in Consumer Cases. Subsection (e) imposes an obligation on the secured party to dispose of consumer goods under certain circumstances. Subsection (f) explains when a disposition that is required under subsection (e) is timely. An effective acceptance of collateral cannot occur if subsection (e) requires a disposition unless the debtor waives this requirement pursuant to Section 9-624(b). Moreover, a secured party who takes possession of collateral and unreasonably delays disposition violates subsection

(e), if applicable, and may also violate Section 9-610 or other provisions of this Part. Subsection (e) eliminates as superfluous the express statutory reference to “conversion” found in former Section 9-505. Remedies available under other law, including conversion, remain available under this Article in appropriate cases. See Sections 1-103, 1-305.

Subsection (g) prohibits the secured party in consumer transactions from accepting collateral in partial satisfaction of the obligation it secures. If a secured party attempts an acceptance in partial satisfaction in a consumer transaction, the attempted acceptance is void.

28-9-621. Notification of proposal to accept collateral. — (a) A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal to:

(1) Any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;

(2) Any other secured party or lienholder that, ten (10) days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(A) identified the collateral;

(B) was indexed under the debtor’s name as of that date; and

(C) was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

(3) Any other secured party that, ten (10) days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in section 28-9-311(a)[, Idaho Code].

(b) A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor in addition to the persons described in subsection (a) of this section.

History.

I.C., § 28-9-621, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler’s Notes.

The bracketed insertion at the end of paragraph (a)(3) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-505.

2. **Notification Requirement.** Subsection (a) specifies three classes of competing claimants to whom the secured party must send notification of its proposal: (i) those who notify the secured party that they claim an interest in the collateral, (ii) holders of certain security interests and liens who have filed against the debtor, and (iii) holders of certain security interests who have perfected by compliance with a statute (including a certificate-of-title statute), regulation, or treaty described in Section 9-311(a). With regard to (ii),

see Section 9-611, Comment 4. Subsection (b) also requires notification to any secondary obligor if the proposal is for acceptance in partial satisfaction.

Unlike Section 9-611, this section contains no “safe harbor,” which excuses an enforcing secured party from notifying certain secured parties and other lienholders. This is because, unlike Section 9-610, which requires that a disposition of collateral be commercially reasonable, Section 9-620 permits the debtor and secured party to set the amount of credit the debtor will receive for the collateral subject

only to the requirement of good faith. An effective acceptance discharges subordinate security interests and other subordinate liens. See Section 9-622. If collateral is subject to several liens securing debts much larger than the value of the collateral, the debtor may be disinclined to refrain from consenting to an acceptance by the holder of the senior security interest, even though, had the debtor objected and the senior disposed of the collateral under Section 9-610, the collateral may have yielded more than enough to satisfy the

senior security interest (but not enough to satisfy all the liens). Accordingly, this section imposes upon the enforcing secured party the risk of the filing office's errors and delay. The holder of a security interest who is entitled to notification under this section but to whom the enforcing secured party does not send notification has the right to recover under Section 9-625(b) any loss resulting from the secured party's noncompliance with this section.

28-9-622. Effect of acceptance of collateral. — (a) A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

- (1) Discharges the obligation to the extent consented to by the debtor;
- (2) Transfers to the secured party all of a debtor's rights in the collateral;
- (3) Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien; and
- (4) Terminates any other subordinate interest.

(b) A subordinate interest is discharged or terminated under subsection (a) of this section, even if the secured party fails to comply with this chapter.

History.

I.C., § 28-9-622, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. Effect of Acceptance. Subsection (a) specifies the effect of an acceptance of collateral in full or partial satisfaction of the secured obligation. The acceptance to which it refers is an effective acceptance. If a purported acceptance is ineffective under Section 9-620, e.g., because the secured party receives a timely objection from a person entitled to notification, then neither this subsection nor subsection (b) applies. Paragraph (1) expresses the fundamental consequence of accepting collateral in full or partial satisfaction of the secured obligation — the obligation is discharged to the extent consented to by the debtor. Unless otherwise agreed, the obligor remains liable for any deficiency. Paragraphs (2) through (4) indicate the effects of an acceptance on various property rights and interests. Paragraph (2) follows Section 9-617(a) in

providing that the secured party acquires "all of a debtor's rights in the collateral" Under paragraph (3), the effect of strict foreclosure on holders of junior security interests and other liens is the same regardless of whether the collateral is accepted in full or partial satisfaction of the secured obligation: all junior encumbrances are discharged. Paragraph (4) provides for the termination of other subordinate interests.

Subsection (b) makes clear that subordinate interests are discharged under subsection (a) regardless of whether the secured party complies with this Article. Thus, subordinate interests are discharged regardless of whether a proposal was required to be sent or, if required, was sent. However, a secured party's failure to send a proposal or otherwise to comply with this Article may subject the secured party to liability under Section 9-625.

28-9-623. Right to redeem collateral. — (a) A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) To redeem collateral, a person shall tender:

- (1) Fulfillment of all obligations secured by the collateral; and
- (2) The reasonable expenses and attorney's fees described in section 28-9-615(a)(1)[, Idaho Code].

(c) A redemption may occur at any time before a secured party:

- (1) Has collected collateral under section 28-9-607[, Idaho Code];
- (2) Has disposed of collateral or entered into a contract for its disposition under section 28-9-610[, Idaho Code]; or
- (3) Has accepted collateral in full or partial satisfaction of the obligation it secures under section 28-9-622[, Idaho Code].

History.

I.C., § 28-9-623, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Section 9-506.

2. **Redemption Right.** Under this section, as under former Section 9-506, the debtor or another secured party may redeem collateral as long as the secured party has not collected (Section 9-607), disposed of or contracted for the disposition of (Section 9-610), or accepted (Section 9-620) the collateral. Although this section generally follows former Section 9-506, it extends the right of redemption to holders of nonconsensual liens. To redeem the collateral a person must tender fulfillment of all obligations secured, plus certain expenses. If the entire balance of a secured obligation has been accelerated, it would be necessary to tender the entire balance. A tender of fulfillment obviously means more than a new promise to perform an existing promise. It requires payment in full of all monetary obligations then due and performance in full of all other obligations

then matured. If unmatured secured obligations remain, the security interest continues to secure them (i.e., as if there had been no default).

3. **Redemption of Remaining Collateral Following Partial Enforcement.** Under Section 9-610 a secured party may make successive dispositions of portions of its collateral. These dispositions would not affect the debtor's, another secured party's, or a lienholder's right to redeem the remaining collateral.

4. **Effect of "Repledging."** Section 9-207 generally permits a secured party having possession or control of collateral to create a security interest in the collateral. As explained in the Comments to that section, the debtor's right (as opposed to its practical ability) to redeem collateral is not affected by, and does not affect, the priority of a security interest created by the debtor's secured party.

28-9-624. Waiver. — (a) A debtor or secondary obligor may waive the right to notification of disposition of collateral under section 28-9-611[, Idaho Code,] only by an agreement to that effect entered into and authenticated after default.

(b) A debtor may waive the right to require disposition of collateral under section 28-9-620(e)[, Idaho Code,] only by an agreement to that effect entered into and authenticated after default.

(c) Except in a consumer goods transaction, a debtor or secondary obligor

may waive the right to redeem collateral under section 28-9-623[, Idaho Code,] only by an agreement to that effect entered into and authenticated after default.

History.

I.C., § 28-9-624, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **Source.** Former Sections 9-504(3), 9-505, 9-506.

2. **Waiver.** This section is a limited exception to Section 9-602, which generally prohibits its waiver by debtors and obligors. It makes

no provision for waiver of the rule prohibiting a secured party from buying at its own private disposition. Transactions of this kind are equivalent to "strict foreclosures" and are governed by Sections 9-620, 9-621, and 9-622.

28-9-625. Remedies for secured party's failure to comply with chapter. — (a) If it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain collection, enforcement or disposition of collateral on appropriate terms and conditions.

(b) Subject to subsections (c) and (d) of this section, a person is liable for damages in the amount of any loss caused by a failure to comply with this chapter. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Except as otherwise provided in section 28-9-628[, Idaho Code]:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) of this section for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event, an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the obligation or the time price differential plus ten percent (10%) of the cash price.

(d) A debtor whose deficiency is eliminated under section 28-9-626[, Idaho Code,] may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under section 28-9-626[, Idaho Code,] may not otherwise recover under subsection (b) of this section for noncompliance with the provisions of this part relating to collection, enforcement, disposition or acceptance.

(e) In addition to any damages recoverable under subsection (b) of this section, the debtor, consumer obligor or person named as a debtor in a filed record, as applicable, may recover one hundred dollars (\$100) in each case from a person that:

- (1) Files a record that the person is not entitled to file under section 28-9-509(a)[, Idaho Code];
 - (2) Fails to cause the secured party of record to file or send a termination statement as required by section 28-9-513(a) or (c)[, Idaho Code].
- (f) If a secured party fails to comply with a request regarding a list of collateral or a statement of account under section 28-9-210[, Idaho Code], the secured party may claim a security interest only as shown in the statement included in the request as against a person that is reasonably misled by the failure.

History.

I.C., § 28-9-625, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

Cited in: *Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc.* (In re Walter B. Scott & Sons, Inc.), 436 B.R. 582 (Bankr. D. Idaho 2010).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Acquiescence in disposition.
 Damages.
 Effect of compliance.
 Failure to give notice.

Acquiescence in Disposition.

In action brought by creditor against guarantors for payment for feedmeal supplied to poultry grower, the trial court did not abuse its discretion in excluding testimony of one guarantor concerning value of collateral, where the court reasoned that, because of guarantor's conduct in taking part in and acquiescing in the disposition, guarantor was estopped from testifying that creditor's disposition of the collateral had been commercially unreasonable. *Ralston-Purina Co. v. Bertie*, 541 F.2d 1363 (9th Cir. 1976).

Damages.

Sale of farm equipment by creditor prior to end of period in which debtor was entitled to redeem was not conduct which justified punitive damages, even though such action might be commercially unreasonable, and debtor had remedy for premature sale under this section. *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980).

Effect of Compliance.

Substantial compliance with the provisions

of the UCC gives rise to a conclusive presumption that the sale of collateral held as security was conducted in a commercially reasonable manner; however, the reverse is not necessarily true. Failure to sell in a "recognized market" does not necessarily render the sale commercially unreasonable as a matter of law; rather, if the code criteria are not satisfied, the issue of commercial reasonableness becomes one of fact. *Tippett v. Bayman*, 105 Idaho 744, 672 P.2d 1074 (Ct. App. 1983).

Failure to Give Notice.

Where the trial court found that the secured party had failed to give the debtors notice of its intended disposition of the collateral held as security as required, the trial court properly determined that, because of this failure, the debtors had the right to redeem all collateral not disposed of and to be paid for the "full total" of the collateral that was not returned or credited to them. *Tippett v. Bayman*, 105 Idaho 744, 672 P.2d 1074 (Ct. App. 1983).

OFFICIAL COMMENT

1. **Source.** Former Section 9-507.

2. **Remedies for Noncompliance; Scope.** Subsections (a) and (b) provide the basic remedies afforded to those aggrieved by a secured party's failure to comply with this Article. Like all provisions that create liability, they are subject to Section 9-628, which should be read in conjunction with Section 9-605. The principal limitations under this Part on a secured party's right to enforce its security interest against collateral are the requirements that it proceed in good faith (Section 1-203), in a commercially reasonable manner (Sections 9-607 and 9-610), and, in most cases, with reasonable notification (Sections 9-611 through 9-614). Following former Section 9-507, under subsection (a) an aggrieved person may seek injunctive relief, and under subsection (b) the person may recover damages for losses caused by noncompliance. Unlike former Section 9-507, however, subsections (a) and (b) are not limited to noncompliance with provisions of this Part of Article 9. Rather, they apply to noncompliance with any provision of this Article. The change makes this section applicable to noncompliance with Sections 9-207 (duties of secured party in possession of collateral), 9-208 (duties of secured party having control over deposit account), 9-209 (duties of secured party if account debtor has been notified of an assignment), 9-210 (duty to comply with request for accounting, etc.), 9-509(a) (duty to refrain from filing unauthorized financing statement), and 9-513(a) or (c) (duty to provide termination statement). Subsection (a) also modifies the first sentence of former Section 9-507(1) by adding the references to "collection" and "enforcement." Subsection (c)(2), which gives a minimum damage recovery in consumer-goods transactions, applies only to noncompliance with the provisions of this Part.

3. **Damages for Noncompliance with This Article.** Subsection (b) sets forth the basic remedy for failure to comply with the requirements of this Article: a damage recovery in the amount of loss caused by the noncompliance. Subsection (c) identifies who may recover under subsection (b). It affords a remedy to any aggrieved person who is a debtor or obligor. However, a principal obligor who is not a debtor may recover damages only for noncompliance with Section 9-616, inasmuch as none of the other rights and duties in this Article run in favor of such a principal obligor. Such a principal obligor could not suffer any loss or damage on account of noncompliance with rights or duties of which it is not a beneficiary. Subsection (c) also affords a remedy to an aggrieved person who holds a competing security interest or other lien, re-

gardless of whether the aggrieved person is entitled to notification under Part 6. The remedy is available even to holders of senior security interests and other liens. The exercise of this remedy is subject to the normal rules of pleading and proof. A person who has delegated the duties of a secured party but who remains obligated to perform them is liable under this subsection. The last sentence of subsection (d) eliminates the possibility of double recovery or other over-compensation arising out of a reduction or elimination of a deficiency under Section 9-626, based on noncompliance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance. Assuming no double recovery, a debtor whose deficiency is eliminated under Section 9-626 may pursue a claim for a surplus. Because Section 9-626 does not apply to consumer transactions, the statute is silent as to whether a double recovery or other over-compensation is possible in a consumer transaction.

Damages for violation of the requirements of this Article, including Section 9-609, are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred. See Section 1-106. Subsection (b) supports the recovery of actual damages for committing a breach of the peace in violation of Section 9-609, and principles of tort law supplement this subsection. See Section 1-103. However, to the extent that damages in tort compensate the debtor for the same loss dealt with by this Article, the debtor should be entitled to only one recovery.

4. **Minimum Damages in Consumer-Goods Transactions.** Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9-507(1) and is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted. Subsection (c)(2) leaves the treatment of statutory damages as it was under former Article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see Section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with Section 9-616 (see Section 9-628(d)).

Following former Section 9-507(1), this Article does not include a definition or explanation of the terms "credit service charge," "principal amount," "time-price differential," or "cash price," as used in subsection (c)(2). It

leaves their construction and application to the court, taking into account the subsection's purpose of providing a minimum recovery in consumer-goods transactions.

5. Supplemental Damages. Subsections (e) and (f) provide damages that supplement the recovery, if any, under subsection (b). Subsection (e) imposes an additional \$500 liability upon a person who fails to comply with the provisions specified in that subsection, and subsection (f) imposes like damages on a person who, without reasonable excuse, fails to comply with a request for an account-

ing or a request regarding a list of collateral or statement of account under Section 9-210. However, under subsection (f), a person has a reasonable excuse for the failure if the person never claimed an interest in the collateral or obligations that were the subject of the request.

6. Estoppel. Subsection (g) limits the extent to which a secured party who fails to comply with a request regarding a list of collateral or statement of account may claim a security interest.

28-9-626. Action in which deficiency or surplus is in issue. — In an action arising from a transaction in which the amount of a deficiency or surplus is in issue, the following rules apply:

(a) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(b) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition or acceptance was conducted in accordance with this part.

(c) Except as otherwise provided in section 28-9-628[, Idaho Code], if a secured party fails to prove that the collection, enforcement, disposition or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses and attorney's fees exceeds the greater of:

(1) The proceeds of the collection, enforcement, disposition or acceptance; or

(2) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition or acceptance.

(d) For purposes of subsection (c)(2) of this section, the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses and attorney's fees unless the secured party proves that the amount is less than that sum.

(e) If a deficiency or surplus is calculated under section 28-9-615(f)[, Idaho Code], the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

History.

I.C., § 28-9-626, as added by 2001, ch. 208, § 2, p. 704; am. 2002, ch. 107, § 5, p. 290.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in the introductory paragraph in subsection (c) and in subsection (e) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

Commercially Reasonable Sale.

The failure of a secured party to dispose of collateral in a commercially reasonable manner raises a rebuttable presumption that the fair market value of the collateral at the time of repossession was equal to the outstanding debt. *Aviation Fin. Group, LLC v. Duc Hous-*

ing Partners, Inc., 2010 U.S. Dist. LEXIS 39007 (D. Idaho Apr. 20, 2010).

Cited in: *Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc.* (In re Walter B. Scott & Sons, Inc.), 436 B.R. 582 (Bankr. D. Idaho 2010).

OFFICIAL COMMENT

1. Source. New.

2. Scope. The basic damage remedy under Section 9-625(b) is subject to the special rules in this section for transactions other than consumer transactions. This section addresses situations in which the amount of a deficiency or surplus is in issue, i.e., situations in which the secured party has collected, enforced, disposed of, or accepted the collateral. It contains special rules applicable to a determination of the amount of a deficiency or surplus. Because this section affects a person's liability for a deficiency, it is subject to Section 9-628, which should be read in conjunction with Section 9-605. The rules in this section apply only to noncompliance in connection with the "collection, enforcement, disposition, or acceptance" under Part 6. For other types of noncompliance with Part 6, the general liability rule of Section 9-625(b) — recovery of actual damages — applies. Consider, for example, a repossession that does not comply with Section 9-609 for want of a default. The debtor's remedy is under Section 9-625(b). In a proper case, the secured party also may be liable for conversion under non-UCC law. If the secured party thereafter disposed of the collateral, however, it would violate Section 9-610 at that time, and this section would apply.

3. Rebuttable Presumption Rule. Subsection (a) establishes the rebuttable presumption rule for transactions other than consumer transactions. Under paragraph (1), the secured party need not prove compliance with the relevant provisions of this Part as part of its *prima facie* case. If, however, the debtor or a secondary obligor raises the issue (in accordance with the forum's rules of pleading and practice), then the secured party bears the burden of proving that the collection, enforcement, disposition, or acceptance

complied. In the event the secured party is unable to meet this burden, then paragraph (3) explains how to calculate the deficiency. Under this rebuttable presumption rule, the debtor or obligor is to be credited with the greater of the actual proceeds of the disposition or the proceeds that would have been realized had the secured party complied with the relevant provisions. If a deficiency remains, then the secured party is entitled to recover it. The references to "the secured obligation, expenses, and attorney's fees" in paragraphs (3) and (4) embrace the application rules in Sections 9-608(a) and 9-615(a).

Unless the secured party proves that compliance with the relevant provisions would have yielded a smaller amount, under paragraph (4) the amount that a complying collection, enforcement, or disposition would have yielded is deemed to be equal to the amount of the secured obligation, together with expenses and attorney's fees. Thus, the secured party may not recover any deficiency unless it meets this burden.

4. Consumer Transactions. Although subsection (a) adopts a version of the rebuttable presumption rule for transactions other than consumer transactions, with certain exceptions Part 6 does not specify the effect of a secured party's noncompliance in consumer transactions. (The exceptions are the provisions for the recovery of damages in Section 9-625.) Subsection (b) provides that the limitation of subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. It also instructs the court not to draw any inference from the limitation as to the proper rules for consumer transactions and leaves the court free to continue to apply established approaches to those transactions.

Courts construing former Section 9-507 disagreed about the consequences of a secured party's failure to comply with the requirements of former Part 5. Three general approaches emerged. Some courts have held that a noncomplying secured party may not recover a deficiency (the "absolute bar" rule). A few courts held that the debtor can offset against a claim to a deficiency all damages recoverable under former Section 9-507 resulting from the secured party's noncompliance (the "offset" rule). A plurality of courts considering the issue held that the noncomplying secured party is barred from recovering a deficiency unless it overcomes a rebuttable presumption that compliance with former Part 5 would have yielded an amount sufficient to satisfy the secured debt. In addition to the nonuniformity resulting from court decisions, some States enacted special rules governing the availability of deficiencies.

5. Burden of Proof When Section 9-615(f) Applies. In a non-consumer transaction, subsection (a)(5) imposes upon a debtor or obligor the burden of proving that the

proceeds of a disposition are so low that, under Section 9-615(f), the actual proceeds should not serve as the basis upon which a deficiency or surplus is calculated. Were the burden placed on the secured party, then debtors might be encouraged to challenge the price received in every disposition to the secured party, a person related to the secured party, or a secondary obligor.

6. Delay in Applying This Section. There is an inevitable delay between the time a secured party engages in a noncomplying collection, enforcement, disposition, or acceptance and the time of a subsequent judicial determination that the secured party did not comply with Part 6. During the interim, the secured party, believing that the secured obligation is larger than it ultimately is determined to be, may continue to enforce its security interest in collateral. If some or all of the secured indebtedness ultimately is discharged under this section, a reasonable application of this section would impose liability on the secured party for the amount of any excess, unwarranted recoveries but would not make the enforcement efforts wrongful.

28-9-627. Determination of whether conduct was commercially reasonable. — (a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition or acceptance was made in a commercially reasonable manner.

(b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

- (1) In the usual manner on any recognized market;
- (2) At the price current in any recognized market at the time of the disposition; or
- (3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(c) A collection, enforcement, disposition or acceptance is commercially reasonable if it has been approved:

- (1) In a judicial proceeding;
- (2) By a bona fide creditors' committee;
- (3) By a representative of creditors; or
- (4) By an assignee for the benefit of creditors.

(d) Approval under subsection (c) of this section need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition or acceptance is not commercially reasonable.

History.

I.C., § 28-9-627, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS

Applicability.

In the absence of an enforceable agreement between the parties, the determination of whether the disposition of collateral was made in a commercially reasonable manner is governed by this section. *Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc.* (In re Walter B.

Scott & Sons, Inc.), 436 B.R. 582 (Bankr. D. Idaho 2010).

Cited in: *Aviation Fin. Group, LLC v. Duc Housing Partners, Inc.*, 2010 U.S. Dist. LEXIS 39007 (D. Idaho Apr. 20, 2010).

OFFICIAL COMMENT

1. **Source.** Former Section 9-507(2).

2. **Relationship of Price to Commercial Reasonableness.** Some observers have found the notion contained in subsection (a) (derived from former Section 9-507(2)) (the fact that a better price could have been obtained does not establish lack of commercial reasonableness) to be inconsistent with that found in Section 9-610(b) (derived from former Section 9-504(3) (every aspect of the disposition, including its terms, must be commercially reasonable)). There is no such inconsistency. While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.

The law long has grappled with the problem of dispositions of personal and real property which comply with applicable procedural requirements (e.g., advertising, notification to interested persons, etc.) but which yield a price that seems low. This Article addresses that issue in Section 9-615(f). That section applies only when the transferee is the secured party, a person related to the secured party, or a secondary obligor. It contains a special rule for calculating a deficiency or

surplus in a complying disposition that yields a price that is “significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.”

3. **Determination of Commercial Reasonableness; Advance Approval.** It is important to make clear the conduct and procedures that are commercially reasonable and to provide a secured party with the means of obtaining, by court order or negotiation with a creditors’ committee or a representative of creditors, advance approval of a proposed method of enforcement as commercially reasonable. This section contains rules that assist in that determination and provides for advance approval in appropriate situations. However, none of the specific methods of disposition specified in subsection (b) is required or exclusive.

4. **“Recognized Market.”** As in Sections 9-610(c) and 9-611(d), the concept of a “recognized market” in subsections (b)(1) and (2) is quite limited; it applies only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges.

28-9-628. Nonliability and limitation on liability of secured party — Liability of secondary obligor. — (a) Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

- (1) The secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this chapter; and
 - (2) The secured party’s failure to comply with this chapter does not affect the liability of the person for a deficiency.
- (b) A secured party is not liable because of its status as secured party:
- (1) To a person that is a debtor or obligor, unless the secured party knows:
 - (A) that the person is a debtor or obligor;

- (B) the identity of the person; and
- (C) how to communicate with the person; or
- (2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:
 - (A) that the person is a debtor; and
 - (B) the identity of the person.
- (c) A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer goods transaction or a consumer transaction or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on:
 - (1) A debtor's representation concerning the purpose for which collateral was to be used, acquired or held; or
 - (2) An obligor's representation concerning the purpose for which a secured obligation was incurred.
- (d) A secured party is not liable to any person under section 28-9-625(c)(2)[, Idaho Code,] for its failure to comply with section 28-9-616[, Idaho Code].
- (e) A secured party is not liable under section 28-9-625(c)(2)[, Idaho Code,] more than once with respect to any one (1) secured obligation.

History.

I.C., § 28-9-628, as added by 2001, ch. 208,
§ 2, p. 708.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (d) and (e) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Source. New.

2. Exculpatory Provisions. Subsections (a), (b), and (c) contain exculpatory provisions that should be read in conjunction with Section 9-605. Without this group of provisions, a secured party could incur liability to unknown persons and under circumstances that would not allow the secured party to protect itself. The broadened definition of the term "debtor" underscores the need for these provisions.

If a secured party reasonably, but mistakenly, believes that a consumer transaction or consumer-goods transaction is a non-consumer transaction or non-consumer-goods transaction, and if the secured party's belief is based on its reasonable reliance on a representation of the type specified in subsection (c)(1) or (c)(2), then this Article should be applied as if the facts reasonably believed and the representation reasonably relied upon were true. For example, if a secured party

reasonably believed that a transaction was a non-consumer transaction and its belief was based on reasonable reliance on the debtor's representation that the collateral secured an obligation incurred for business purposes, the secured party is not liable to any person, and the debtor's liability for a deficiency is not affected, because of any act or omission of the secured party which arises out of the reasonable belief. Of course, if the secured party's belief is not reasonable or, even if reasonable, is not based on reasonable reliance on the debtor's representation, this limitation on liability is inapplicable.

3. Inapplicability of Statutory Damages to Section 9-616. Subsection (d) excludes noncompliance with Section 9-616 entirely from the scope of statutory damage liability under Section 9-625(c)(2).

4. Single Liability for Statutory Minimum Damages. Subsection (e) ensures that a secured party will incur statutory damages

only once in connection with any one secured obligation.

PART 7. TRANSITION

28-9-701. [Reserved.]

History.

I.C., § 28-9-701, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

In the uniform code, this section relates to the effective date of the revision of Article 9.

that the act should take effect on and after July 1, 2001.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

OFFICIAL COMMENT

A uniform law as complex as Article 9 necessarily gives rise to difficult problems and uncertainties during the transition to the new law. As is customary for uniform laws, this Article is based on the general assumption that all States will have enacted substantially identical versions. While always important, uniformity is essential to the success of this Article. If former Article 9 is in effect in some jurisdictions, and this Article is in effect in others, horrendous complications may arise. For example, the proper place in which to file to perfect a security interest (and thus the status of a particular security interest as perfected or unperfected) would depend on whether the matter was litigated in a State in which former Article 9 was in effect or a State in which this Article was in effect. Accordingly, this section contemplates that States

will adopt a uniform effective date for this Article. Any one State's failure to adopt the uniform effective date will greatly increase the cost and uncertainty surrounding the transition.

Other problems arise from transactions and relationships that were entered into under former Article 9 or under non-UCC law and which remain outstanding on the effective date of this Article. The difficulties arise primarily because this Article expands the scope of former Article 9 to cover additional types of collateral and transactions and because it provides new methods of perfection for some types of collateral, different priority rules, and different choice-of-law rules governing perfection and priority. This Section and the other sections in this Part address primarily this second set of problems.

28-9-702. Savings clause. — (a) Except as otherwise provided in this part, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this act takes effect.

(b) Except as otherwise provided in subsection (c) of this section and sections 28-9-703 through 28-9-709[, Idaho Code]:

(1) Transactions and liens that were not governed by former chapter 9, title 28, Idaho Code, were validly entered into or created before this act takes effect, and would be subject to this act if they had been entered into or created after this act takes effect, and the rights, duties, and interests flowing from those transactions and liens remain valid after this act takes effect; and

(2) The transactions and liens may be terminated, completed, consummated and enforced as required or permitted by this act or by the law that otherwise would apply if this act had not taken effect.

(c) This act does not affect an action, case or proceeding commenced before this act takes effect.

History.

I.C., § 28-9-702, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" in this section refers to S.L. 2001, ch. 208, which revised Article (Chapter) 9 of the Uniform Commercial Code and amended many other sections of the Idaho Code in conformance with that revision.

The bracketed insertion at the end of the

introductory paragraph in subsection (b) was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS**Continued Perfection.**

Since the creditor's security interest was perfected under § 28-9-302(1) by filing a financing statement, no further action was

required for the creditor to be perfected under § 28-9-703(a) or § 28-9-702. In *re Wiersma*, 283 Bankr. 294 (Bankr. D. Idaho 2002), *aff'd* in part, 324 Bankr. 92 (B.A.P. 9th Cir. 2005).

OFFICIAL COMMENT**1. Pre-Effective-Date Transactions.**

Subsection (a) contains the general rule that this Article applies to transactions, security interests, and other liens within its scope (see Section 9-109), even if the transaction or lien was entered into or created before the effective date. Thus, secured transactions entered into under former Article 9 must be terminated, completed, consummated, and enforced under this Article. Subsection (b) is an exception to the general rule. It applies to valid, pre-effective-date transactions and liens that were not governed by former Article 9 but would be governed by this Article if they had been entered into or created after this Article takes effect. Under subsection (b),

these valid transactions, such as the creation of agricultural liens and security interests in commercial tort claims, retain their validity under this Article and may be terminated, completed, consummated, and enforced under this Article. However, these transactions also may be terminated, completed, consummated, and enforced by the law that otherwise would apply had this Article not taken effect.

2. Judicial Proceedings Commenced Before Effective Date. As is usual in transition provisions, subsection (c) provides that this Article does not affect litigation pending on the effective date.

28-9-703. Security interest perfected before effective date. —

(a) A security interest that is enforceable immediately before this act takes effect and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this act if, when this act takes effect, the applicable requirements for enforceability and perfection under this act are satisfied without further action.

(b) Except as otherwise provided in section 28-9-705[, Idaho Code], if, immediately before this act takes effect, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this act are not satisfied when this act takes effect, the security interest:

- (1) Is a perfected security interest for one (1) year after this act takes effect;
- (2) Remains enforceable thereafter only if the security interest becomes enforceable under section 28-9-203[, Idaho Code,] before the year expires; and
- (3) Remains perfected thereafter only if the applicable requirements for perfection under this act are satisfied before the year expires.

History.

I.C., § 28-9-703, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" in this section refers to S.L. 2001, ch. 208, which revised Article (Chapter) 9 of the Uniform Commercial Code and amended many other sections of the Idaho Code in conformance with that revision.

The bracketed insertions in the introduc-

tory paragraph in subsection (b) and in paragraph (b)(2) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

JUDICIAL DECISIONS**Continued Perfection.**

Since the creditor's security interest was perfected under § 28-9-302(1) by filing a financing statement, no further action was

required for the creditor to be perfected under § 28-9-703(a). In re Wiersma, 283 Bankr. 294 (Bankr. D. Idaho 2002), aff'd in part, 324 Bankr. 92 (B.A.P. 9th Cir. 2005).

OFFICIAL COMMENT

1. Perfected Security Interests Under Former Article 9 and This Article. This section deals with security interests that are perfected (i.e., that are enforceable and have priority over the rights of a lien creditor) under former Article 9 or other applicable law immediately before this Article takes effect. Subsection (a) provides, not surprisingly, that if the security interest would be a perfected security interest under this Article (i.e., if the transaction satisfies this Article's requirements for enforceability (attachment) and perfection), no further action need be taken for the security interest to be a perfected security interest.

2. Security Interests Enforceable and Perfected Under Former Article 9 but Unenforceable or Unperfected Under This Article. Subsection (b) deals with security interests that are enforceable and perfected under former Article 9 or other applicable law immediately before this Article takes effect but do not satisfy the requirements for enforceability (attachment) or perfection under this Article. Except as otherwise provided in Section 9-705, these security interests are perfected security interests for one

year after the effective date. If the security interest satisfies the requirements for attachment and perfection within that period, the security interest remains perfected thereafter. If the security interest satisfies only the requirements for attachment within that period, the security interest becomes unperfected at the end of the one-year period.

Example 1: A pre-effective-date security agreement in a consumer transaction covers "all securities accounts." The security interest is properly perfected. The collateral description was adequate under former Article 9 (see former Section 9-115(3)) but is insufficient under this Article (see Section 9-108(e)(2)). Unless the debtor authenticates a new security agreement describing the collateral other than by "type" (or Section 9-203(b)(3) otherwise is satisfied) within the one-year period following the effective date, the security interest becomes unenforceable at the end of that period.

Other examples under former Article 9 or other applicable law that may be effective as attachment or enforceability steps but may be ineffective under this Article include an oral agreement to sell a payment intangible or

possession by virtue of a notification to a bailee under former Section 9-305. Neither the oral agreement nor the notification would satisfy the revised Section 9-203 requirements for attachment.

Example 2: A pre-effective-date possessory security interest in instruments is perfected by a bailee's receipt of notification under former 9-305. The bailee has not, however, acknowledged that it holds for the secured party's benefit under revised Section 9-313. Unless the bailee authenticates a record acknowledging that it holds for the secured party (or another appropriate perfection step is taken) within the one-year period following the effective date, the security interest becomes unperfected at the end of that period.

3. Interpretation of Pre-Effective-Date Security Agreements. Section 9-102 defines "security agreement" as "an agreement that creates or provides for a security interest." Under Section 1-201(3), an "agreement" is a "bargain of the parties in fact." If parties to a pre-effective-date security agreement describe the collateral by using a term defined

in former Article 9 in one way and defined in this Article in another way, in most cases it should be presumed that the bargain of the parties contemplated the meaning of the term under former Article 9.

Example 3: A pre-effective-date security agreement covers "all accounts" of a debtor. As defined under former Article 9, an "account" did not include a right to payment for lottery winnings. These rights to payment are "accounts" under this Article, however. The agreement of the parties presumptively created a security interest in "accounts" as defined in former Article 9. A different result might be appropriate, for example, if the security agreement explicitly contemplated future changes in the Article 9 definitions of types of collateral — e.g., "Accounts" means 'accounts' as defined in the UCC Article 9 of [State X], *as that definition may be amended from time to time.*" Whether a different approach is appropriate in any given case depends on the bargain of the parties, as determined by applying ordinary principles of contract construction.

28-9-704. Security interest unperfected before effective date. — A security interest that is enforceable immediately before this act takes effect but which would be subordinate to the rights of a person that becomes a lien creditor at that time:

- (1) Remains an enforceable security interest for one (1) year after this act takes effect;
- (2) Remains enforceable thereafter if the security interest becomes enforceable under section 28-9-203[, Idaho Code,] when this act takes effect or within one (1) year thereafter; and
- (3) Becomes perfected:
 - (A) Without further action, when this act takes effect if the applicable requirements for perfection under this act are satisfied before or at that time; or
 - (B) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

History.

I.C., § 28-9-704, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in this section refers to S.L. 2001, ch. 208, which revised Article (Chapter) 9 of the Uniform Commercial Code and amended many other sections of the Idaho Code in conformance with that revision.

The bracketed insertion in subsection (2)

was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

This section deals with security interests that are enforceable but unperfected (i.e., subordinate to the rights of a person who becomes a lien creditor) under former Article 9 or other applicable law immediately before this Article takes effect. These security interests remain enforceable for one year after the effective date, and thereafter if the appropriate steps for attachment under this Article are taken before the one-year period expires. (This section's treatment of enforceability is the same as that of Section 9-703.) The security interest becomes a perfected security interest on the effective date if, at that time, the security interest satisfies the requirements for perfection under this Article. If the security interest does not satisfy the requirements

for perfection until sometime thereafter, it becomes a perfected security interest at that later time.

Example: A security interest has attached under former Article 9 but is unperfected because the filed financing statement covers "all of debtor's personal property" and controlling case law in the applicable jurisdiction has determined that this identification of collateral in a financing statement is insufficient. Upon the effective date of this Article, the financing statement becomes sufficient under Section 9-504(2). On that date the security interest becomes perfected. (This assumes, of course, that the financing statement is filed in the proper filing office under this Article.)

28-9-705. Effectiveness of action taken before effective date. —

(a) If action, other than the filing of a financing statement, is taken before this act takes effect and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before this act takes effect, the action is effective to perfect a security interest that attaches under this act within one (1) year after this act takes effect. An attached security interest becomes unperfected one (1) year after this act takes effect unless the security interest becomes a perfected security interest under this act before the expiration of that period.

(b) The filing of a financing statement before this act takes effect is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this act.

(c) This act does not render ineffective an effective financing statement that, before this act takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former section 28-9-103[, Idaho Code]. However, except as otherwise provided in subsections (d) and (e) of this section and section 28-9-706[, Idaho Code], the financing statement ceases to be effective at the earlier of:

(1) The time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

(2) June 30, 2006.

(d) The filing of a continuation statement after this act takes effect does not continue the effectiveness of the financing statement filed before this act takes effect. However, upon the timely filing of a continuation statement after this act takes effect and in accordance with the law of the jurisdiction governing perfection as provided in part 3[, chapter 9, title 28, Idaho Code], the effectiveness of a financing statement filed in the same office in that jurisdiction before this act takes effect continues for the period provided by the law of that jurisdiction.

(e) Subsection (c)(2) of this section applies to a financing statement that, before this act takes effect, is filed against a transmitting utility and

satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former section 28-9-103[, Idaho Code,] only to the extent that part 3[, chapter 9, title 28, Idaho Code,] provides that the law of a jurisdiction other than jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) A financing statement that includes a financing statement filed before this act takes effect and a continuation statement filed after this act takes effect is effective only to the extent that it satisfies the requirements of part 5 for an initial financing statement.

(g) A financing statement filed as a fixture, timber or mineral filing before July 1, 2001 (except for a record of mortgage which is effective as a financing statement filed as a fixture filing) shall cease to be effective after June 30, 2006. The effectiveness of such a financing statement may be continued by filing a continuation statement between January 1, 2006, and June 30, 2006, inclusive. The new five (5) year effective period for such a financing statement, as provided in section 28-9-515[, Idaho Code], shall commence on the date of filing such continuation statement.

History.

I.C., § 28-9-705, as added by 2001, ch. 208, § 2, p. 704; am. 2002, ch. 107, § 6, p. 290.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in this section refers to S.L. 2001, ch. 208, which revised Article (Chapter) 9 of the Uniform Commercial Code and amended many other sections of the Idaho Code in conformance with that revision.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style

The words enclosed in parentheses so appeared in the law as enacted

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. **General.** This section addresses primarily the situation in which the perfection step is taken under former Article 9 or other applicable law before the effective date of this Article, but the security interest does not attach until after that date.

2. **Perfection Other Than by Filing.** Subsection (a) applies when the perfection step is a step other than the filing of a financing statement. If the step that would be a valid perfection step under former Article 9 or other law is taken before this Article takes effect, and if a security interest attaches within one year after this Article takes effect, then the security interest becomes a perfected security interest upon attachment. However, the security interest becomes unperfected one year after the effective date unless the requirements for attachment and perfection un-

der this Article are satisfied within that period.

3. **Perfection by Filing; Ineffective Filings Made Effective.** Subsection (b) deals with financing statements that were filed under former Article 9 and which would not have perfected a security interest under the former Article (because, e.g., they did not accurately describe the collateral or were filed in the wrong place), but which would perfect a security interest under this Article. Under subsection (b), such a financing statement is effective to perfect a security interest to the extent it complies with this Article. Subsection (b) applies regardless of the reason for the filing. For example, a secured party need not wait until the effective date to respond to the change this Article makes with respect to the jurisdiction whose law governs perfection

of certain security interests. Rather, a secured party may wish to prepare for this change by filing a financing statement before the effective date in the jurisdiction whose law governs perfection under this Article. When this Article takes effect, the filing becomes effective to perfect a security interest (assuming the filing satisfies the perfection requirements of this Article). Note, however, that Section 9-706 determines whether a financing statement filed before the effective date operates to continue the effectiveness of a financing statement filed in another office before the effective date.

4. Perfection by Filing: Change in Applicable Law or Filing Office. Subsection (c) provides that a financing statement filed in the proper jurisdiction under former Section 9-103 remains effective for all purposes, despite the fact that this Article would require filing of a financing statement in a different jurisdiction or in a different office in the same jurisdiction. This means that, during the early years of this Article's effectiveness, it may be necessary to search not only in the filing office of the jurisdiction whose law governs perfection under this Article but also (if different) in the jurisdiction(s) and filing office(s) designated by former Article 9. To limit this burden, subsection (c) provides that a financing statement filed in the jurisdiction determined by former Section 9-103 becomes ineffective at the earlier of the time it would become ineffective under the law of that jurisdiction or June 30, 2006. The June 30, 2006, limitation addresses some nonuniform versions of former Article 9 that extended the effectiveness of a financing statement beyond five years. Note that a financing statement filed before the effective date may remain effective beyond June 30, 2006, if subsection (d) (concerning continuation statements) or (e) (concerning transmitting utilities) or Section 9-706 (concerning initial financing statements that operate to continue pre-effective-date financing statements) so provides.

Subsection (c) is an exception to Section 9-703(b). Under the general rule in Section 9-703(b), a security interest that is enforceable and perfected on the effective date of this Article is a perfected security interest for one year after this Article takes effect, even if the security interest is not enforceable under this Article and the applicable requirements for perfection under this Article have not been met. However, in some cases subsection (c) may shorten the one-year period of perfection; in others, if the security interest is enforceable under Section 9-203, it may extend the period of perfection.

Example 1: On July 3, 1996, D, a State X corporation, creates a security interest in certain manufacturing equipment located in State Y. On July 6, 1996, SP perfects a secu-

rity interest in the equipment under former Article 9 by filing in the office of the State Y Secretary of State. See former Section 9-103(1)(b). This Article takes effect in States X and Y on July 1, 2001. Under Section 9-705(c), the financing statement remains effective until it lapses in July 2001. See former Section 9-403. Had SP continued the effectiveness of the financing statement by filing a continuation statement in State Y under former Article 9 before July 1, 2001, the financing statement would have remained effective to perfect the security interest through June 30, 2006. See subsection (c)(2). Alternatively, SP could have filed an initial financing statement in State X under subsection (b) or Section 9-706 before the State Y financing statement lapsed. Had SP done so, the security interest would have remained perfected without interruption until the State X financing statement lapsed.

5. Continuing Effectiveness of Filed Financing Statement. A financing statement filed before the effective date of this Article may be continued only by filing in the State and office designated by this Article. This result is accomplished in the following manner: Subsection (d) indicates that, as a general matter, a continuation statement filed after the effective date of this Article does not continue the effectiveness of a financing statement filed under the law designated by former Section 9-103. Instead, an initial financing statement must be filed under Section 9-706. The second sentence of subsection (d) contains an exception to the general rule. It provides that a continuation statement is effective to continue the effectiveness of a financing statement filed before this Article takes effect if this Article prescribes not only the same jurisdiction but also the same filing office.

Example 2: On November 8, 2000, D, a State X corporation, creates a security interest in certain manufacturing equipment located in State Y. On November 15, 2000, SP perfects a security interest in the equipment under former Article 9 by filing in office of the State Y Secretary of State. See former Section 9-103(1)(b). This Article takes effect in States X and Y on July 1, 2001. Under Section 9-705(c), the financing statement ceases to be effective in November, 2005, when it lapses. See Section 9-515. Under this Article, the law of D's location (State X, see Section 9-307) governs perfection. See Section 9-301. Thus, the filing of a continuation statement in State Y after the effective date would not continue the effectiveness of the financing statement. See subsection (d). However, the effectiveness of the financing statement could be continued under Section 9-706.

Example 3: The facts are as in Example 2, except that D is a State Y corporation. As-

sume State Y adopted former Section 9-401(1) (second alternative). State Y law governs perfection under Part 3 of this Article. (See Sections 9-301, 9-307.) Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y continues the effectiveness of the financing statement.

Example 4: The facts are as in Example 3, except that the collateral is equipment used in farming operations and, in accordance with former Section 9-401(1) (second alternative) as enacted in State Y, the financing statement was filed in State Y, in the office of the Shelby County Recorder of Deeds. Under this Article, a continuation statement must be filed in the office of the State Y Secretary of State. See Section 9-501(a)(2). Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y operates to continue a pre-effective-date financing statement only if the continuation statement is filed in the same office as the financing statement. Accordingly, the continuation statement is not effective in this case, but the financing statement may be continued under Section 9-706.

Example 5: The facts are as in Example 3, except that State Y enacted former Section 9-401(1) (third alternative). As required by former Section 9-401(1), SP filed financing statements in both the office of the State Y Secretary of State and the office of the Shelby County Recorder of Deeds. Under this Article, a continuation statement must be filed in the office of the State Y Secretary of State. See Section 9-501(a)(2). The timely filing of a continuation statement in that office after this Article takes effect would be effective to continue the effectiveness of the financing statement (and thus continue the perfection of the security interest), even if the financing statement filed with the County Recorder lapses.

6. Continuation Statements. In some cases, this Article reclassifies collateral covered by a financing statement filed under

former Article 9. For example, collateral consisting of the right to payment for real property sold would be a “general intangible” under the former Article but an “account” under this Article. To continue perfection under those circumstances, a continuation statement must comply with the normal requirements for a continuation statement. See Section 9-515. In addition, the pre-effective-date financing statement and continuation statement, taken together, must satisfy the requirements of this Article concerning the sufficiency of the debtor’s name, secured party’s name, and indication of collateral. See subsection (f).

Example 6: A pre-effective-date financing statement covers “all general intangibles” of a debtor. As defined under former Article 9, a “general intangible,” would include rights to payment for lottery winnings. These rights to payment are “accounts” under this Article, however. A post-effective-date continuation statement will not continue the effectiveness of the pre-effective-date financing statement with respect to lottery winnings unless it amends the indication of collateral covered to include lottery winnings (e.g., by adding “accounts,” “rights to payment for lottery winnings,” or the like). If the continuation statement does not amend the indication of collateral, the continuation statement will be effective to continue the effectiveness of the financing statement only with respect to “general intangibles” as defined in this Article.

Example 7: The facts are as in Example 6, except that the pre-effective-date financing statement covers “all accounts and general intangibles.” Even though rights to payment for lottery winnings are “general intangibles” under former Article 9 and “accounts” under this Article, a post-effective-date continuation statement would continue the effectiveness of the pre-effective-date financing statement with respect to lottery winnings. There would be no need to amend the indication of collateral covered, inasmuch as the indication (“accounts”) satisfies the requirements of this Article.

28-9-706. When initial financing statement suffices to continue effectiveness of financing statement. — (a) The filing of an initial financing statement in the office specified in section 28-9-501[, Idaho Code,] continues the effectiveness of a financing statement filed before this act takes effect if:

- (1) The filing of an initial financing statement in that office would be effective to perfect a security interest under this act;
 - (2) The preeffective-date financing statement was filed in an office in another state or another office in this state; and
 - (3) The initial financing statement satisfies subsection (c) of this section.
- (b) The filing of an initial financing statement under subsection (a) of this

section continues the effectiveness of the preeffective-date financing statement:

- (1) If the initial financing statement is filed before this act takes effect, for the period provided in former section 28-9-403[, Idaho Code,] with respect to a financing statement; and
 - (2) If the initial financing statement is filed after this act takes effect, for the period provided in section 28-9-515[, Idaho Code,] with respect to an initial financing statement.
- (c) To be effective for purposes of subsection (a) of this section, an initial financing statement must:
- (1) Satisfy the requirements of part 5[, chapter 9, title 28, Idaho Code,] for an initial financing statement;
 - (2) Identify the preeffective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and
 - (3) Indicate that the preeffective-date financing statement remains effective.

History.

I.C., § 28-9-706, as added by 2001, ch. 208,
§ 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in this section refers to S.L. 2001, ch. 208, which revised Article (Chapter) 9 of the Uniform Commercial Code and amended many other sections of the Idaho Code in conformance with that revision.

The bracketed insertions throughout this

section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Continuation of Financing Statements Not Filed in Proper Filing Office Under This Article. This section deals with continuing the effectiveness of financing statements that are filed in the proper State and office under former Article 9, but which would be filed in the wrong State or in the wrong office of the proper State under this Article. Section 9-705(d) provides that, under these circumstances, filing a continuation statement after the effective date of this Article in the office designated by former Article 9 would not be effective. This section provides the means by which the effectiveness of such a financing statement can be continued if this Article governs perfection under the applicable choice-of-law rule: filing an initial financing statement in the office specified by Section 9-501.

Although it has the effect of continuing the effectiveness of a pre-effective-date financing statement, an initial financing statement described in this section is not a continuation statement. Rather, it is governed by the rules applicable to initial financing statements. (However, the debtor need not authorize the filing. See Section 9-708.) Unlike a continuation statement, the initial financing statement described in this section may be filed any time during the effectiveness of the pre-effective — date financing statement — even before this Article is enacted — and not only within the six months immediately prior to lapse. In contrast to a continuation statement, which extends the lapse date of a filed financing statement for five years, the initial financing statement has its own lapse date, which bears no relation to the lapse date of

the pre-effective-date financing statement whose effectiveness the initial financing statement continues. See subsection (b).

As subsection (a) makes clear, the filing of an initial financing statement under this section *continues* the effectiveness of a pre-effective-date financing statement. If the effectiveness of a pre-effective-date financing statement lapses before the initial financing statement is filed, the effectiveness of the pre-effective-date financing statement cannot be continued. Rather, unless the security interest is perfected otherwise, there will be a period during which the security interest is unperfected before becoming perfected again by the filing of the initial financing statement under this section.

If an initial financing statement is filed under this section before the effective date of this Article, it takes effect when this Article takes effect (assuming that it is ineffective under former Article 9). Note, however, that former Article 9 determines whether the filing office is obligated to accept such an initial financing statement. For the reason given in the preceding paragraph, an initial financing statement filed before the effective date of this Article does not continue the effectiveness of a pre-effective-date financing statement unless the latter remains effective on the effective date of this Article. Thus, for example, if the effectiveness of the pre-effective-date financing statement lapses before this Article takes effect, the initial financing statement would not continue its effectiveness.

2. Requirements of Initial Financing Statement Filed in Lieu of Continuation Statement. Subsection (c) sets forth the requirements for the initial financing statement under subsection (a). These requirements are needed to inform searchers that the initial financing statement operates to continue a financing statement filed elsewhere and to enable searchers to locate and discover the attributes of the other financing statement. The notice-filing policy of this Article applies to the initial financing statements described in this section. Accordingly, an initial financing statement that substantially satisfies the requirements of subsection (c) is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading. See Section 9-506.

A single initial financing statement may continue the effectiveness of more than one financing statement filed before this Article's effective date. See Section 1-106 (words in the singular include the plural). If a financing statement has been filed in more than one office in a given jurisdiction, as may be the case if the jurisdiction had adopted former Section 9-401(1), third alternative, then an identification of the filing in the central filing office suffices for purposes of subsection (c)(2). If under this Article the collateral is of a type different from its type under former Article 9 — as would be the case, e.g., with a right to payment of lottery winnings (a “general intangible” under former Article 9 and an “account” under this Article), then subsection (c) requires that the initial financing statement indicate the type under this Article.

28-9-707. Amendment of preeffective-date financing statement.

— A person may file an initial financing statement or a continuation statement under this part if:

(a) In this section, “preeffective-date financing statement” means a financing statement filed before July 1, 2001.

(b) After July 1, 2001, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a preeffective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in part 3[, chapter 9, title 28, Idaho Code]. However, the effectiveness of a preeffective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) Except as otherwise provided in subsection (d) of this section, if the law of this state governs perfection of a security interest, the information in a preeffective-date financing statement may be amended only if:

(1) The preeffective-date financing statement and an amendment are filed in the office specified in section 28-9-501[, Idaho Code];

(2) An amendment is filed in the office specified in section 28-9-501[, Idaho Code], concurrently with, or after the filing in that office of, an

initial financing statement that satisfies the provisions of subsection (c) of section 28-9-706[, Idaho Code]; or

(3) An initial financing statement that provides the information as amended and satisfies the provisions of subsection (c) of section 28-9-706[, Idaho Code], is filed in the office specified in section 28-9-501[, Idaho Code].

(d) If the law of this state governs perfection of a security interest, the effectiveness of a preeffective-date financing statement may be continued only pursuant to the provisions of subsections (d) and (f) of section 28-9-705[, Idaho Code], or section 28-9-706[, Idaho Code].

(e) Whether or not the law of this state governs perfection of a security interest, the effectiveness of a preeffective-date financing statement filed in this state may be terminated by filing a termination statement in the office in which the preeffective-date financing statement is filed, unless an initial financing statement that satisfies the provisions of subsection (c) of section 28-9-706[, Idaho Code], has been filed in the office specified by the law of the jurisdiction governing perfection as provided in part 3[, chapter 9, title 28, Idaho Code,] as the office in which to file a financing statement.

History.

I.C., § 28-9-707, as added by 2001, ch. 208,
§ 2, p. 704; am. 2004, ch. 304, § 2, p. 852.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section was added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Scope of This Section. This section addresses post-effective-date amendments to pre-effective-date financing statements.

2. Applicable Law. Determining how to amend a pre-effective-date financing statement requires one first to determine the jurisdiction whose law applies. Subsection (b) provides that, as a general matter, post-effective-date amendments to pre-effective-date financing statements are effective only if they are accomplished in accordance with the substantive (or local) law of the jurisdiction governing perfection under Part 3 of this Article. However, under certain circumstances, the effectiveness of a financing statement may be terminated in accordance with the substantive law of the jurisdiction in which the financing statement is filed. See Comment 5, below.

Example 1: D is a corporation organized under the law of State Y. It owns equipment located in State X. Under former Article 9, SP properly perfected a security interest in the equipment by filing a financing statement in State X. Under this Article, the law of State Y

governs perfection of the security interest. See Sections 9-301, 9-307. After this Article takes effect, SP wishes to amend the financing statement to reflect a change in D's name. Under subsection (b), the financing statement may be amended in accordance with the law of State Y, i.e., in accordance with subsection (c) as enacted in State Y.

Example 2: The facts are as in Example 1, except that SP wishes to terminate the effectiveness of the State X filing. The first sentence of subsection (b) provides that the financing statement may be terminated after the effective date of this Article in accordance with the law of State Y, i.e., in accordance with subsection (c) as enacted in State Y. However, the second sentence provides that the financing statement also may be terminated in accordance with the law of the jurisdiction in which it is filed, i.e., in accordance with subsection (e) as enacted in State X. If the pre-effective-date financing statement is filed in the jurisdiction whose law governs perfection (here, State Y), then both sentences would designate the law of State Y as appli-

cable to the termination of the financing statement. That is, the financing statement could be terminated in accordance with subsection (c) or (e) as enacted in State Y.

3. Method of Amending. Subsection (c) provides three methods of effectuating a post-effective-date amendment to a pre-effective-date financing statement. Under subsection (c)(1), if the financing statement is filed in the jurisdiction and office determined by this Article, then an effective amendment may be filed in the same office.

Example 3: D is a corporation organized under the law of State Z. It owns equipment located in State Z. Before the effective date of this Article, SP perfected a security interest in the equipment by filing in two offices in State Z, a local filing office and the office of the Secretary of State. See former Section 9-401(1) (third alternative). State Z enacts this Article and specifies in Section 9-501 that a financing statement covering equipment is to be filed in the office of the Secretary of State. SP wishes to assign its power as secured party of record. Under subsection (b), the substantive law of State Z applies. Because the pre-effective-date financing statement is filed in the office specified in subsection (c)(1) as enacted by State Z, SP may effectuate the assignment by filing an amendment under Section 9-514 with the office of the Secretary of State. SP need not amend the local filing, and the priority of the security interest perfected by the filing of the financing statement would not be affected by the failure to amend the local filing.

If a pre-effective-date financing statement is filed in an office other than the one specified by Section 9-501 of the relevant jurisdiction, then ordinarily an amendment filed in that office is ineffective. (Subsection (e) provides an exception for termination statements.) Rather, the amendment must be effectuated by a filing in the jurisdiction and office determined by this Article. That filing may consist of an initial financing statement followed by an amendment, an initial financing statement together with an amendment, or an initial financing statement that indicates the information provided in the financing statement, as amended. Subsection (c)(2) encompasses the first two options; subsection (c)(3) contemplates the last. In each instance, the initial financing statement must satisfy Section 9-706(c).

4. Continuation. Subsection (d) refers to the two methods by which a secured party may continue the effectiveness of a pre-effective-date financing statement under this Part. The Comments to Sections 9-705 and 9-706 explain these methods.

5. Termination. The effectiveness of a pre-effective-date financing statement may be terminated pursuant to subsection (c). This section also provides an alternative method for accomplishing this result: filing a termination statement in the office in which the financing statement is filed. The alternative method becomes unavailable once an initial financing statement that relates to the pre-effective-date financing statement and satisfies Section 9-706(c) is filed in the jurisdiction and office determined by this Article.

Example 4: The facts are as in Example 1, except that SP wishes to terminate a financing statement filed in State X. As explained in Example 1, the financing statement may be amended in accordance with the law of the jurisdiction governing perfection under this Article, i.e., in accordance with the substantive law of State Y. As enacted in State Y, subsection (c)(1) is inapplicable because the financing statement was not filed in the State Y filing office specified in Section 9-501. Under subsection (c)(2), the financing statement may be amended by filing in the State Y filing office an initial financing statement followed by a termination statement. The filing of an initial financing statement together with a termination statement also would be legally sufficient under subsection (c)(2), but Section 9-512(a)(1) may render this method impractical. The financing statement also may be amended under subsection (c)(3), but the resulting initial financing statement is likely to be very confusing. In each instance, the initial financing statement must satisfy Section 9-706(c). Applying the law of State Y, subsection (e) is inapplicable, because the financing statement was not filed in “this State,” i.e., State Y.

This section affords another option to SP. Subsection (b) provides that the effectiveness of a financing statement may be terminated either in accordance with the law of the jurisdiction governing perfection (here, State Y) or in accordance with the substantive law of the jurisdiction in which the financing statement is filed (here, State X). Applying the law of State X, the financing statement is filed in “this State,” i.e., State X, and subsection (e) applies. Accordingly, the effectiveness of the financing statement can be terminated by filing a termination statement in the State X office in which the financing statement is filed, unless an initial financing statement that relates to the financing statement and satisfies Section 9-706(c) as enacted in State X has been filed in the jurisdiction and office determined by this Article (here, the State Y filing office).

28-9-708. Persons entitled to file initial financing statement or continuation statement. — A person may file an initial financing statement or a continuation statement under this part if:

- (1) The secured party of record authorizes the filing; and
- (2) The filing is necessary under this part:
 - (A) To continue the effectiveness of a financing statement filed before this act takes effect; or
 - (B) To perfect or continue the perfection of a security interest.

History.

I.C., § 28-9-708, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in this section refers to S.L. 2001, ch. 208, which revised Article (Chapter) 9 of the Uniform Commercial Code and amended many other sections of the Idaho Code in conformance with that revision.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

This section permits a secured party to file an initial financing statement or continuation statement necessary under this Part to continue the effectiveness of a financing statement filed before this Article takes effect or to perfect or otherwise continue the perfection of

a security interest. Because a filing described in this section typically operates to continue the effectiveness of a financing statement whose filing the debtor already has authorized, this section does not require authorization from the debtor.

28-9-709. Priority. — (a) This act determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before this act takes effect, former chapter 9, title 28[, Idaho Code], determines priority.

(b) For purposes of section 28-9-322(a)[, Idaho Code], the priority of a security interest that becomes enforceable under section 28-9-203[, Idaho Code,] of this act dates from the time this act takes effect if the security interest is perfected under this act by the filing of a financing statement before this act takes effect which would not have been effective to perfect the security interest under former chapter 9, title 28[, Idaho Code]. This subsection does not apply to conflicting security interests, each of which is perfected by the filing of such a financing statement.

History.

I.C., § 28-9-709, as added by 2001, ch. 208, § 2, p. 704.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in this section refers to S.L. 2001, ch. 208, which revised Article (Chapter) 9 of the Uniform Commercial Code

and amended many other sections of the Idaho Code in conformance with that revision.

The bracketed insertions throughout this

section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided

that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

1. Law Governing Priority. Ordinarily, this Article determines the priority of conflicting claims to collateral. However, when the relative priorities of the claims were established before this Article takes effect, former Article 9 governs.

Example 1: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ("account"). SP-1 fails to file a financing statement. This Article takes effect on July 1, 2001. Thereafter, on August 1, 2001, D creates a security interest in the same account in favor of SP-2, who files a financing statement. This Article determines the relative priorities of the claims. SP-2's security interest has priority under Section 9-322(a)(1).

Example 2: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ("account"). SP-1 fails to file a financing statement. In 2000, D creates a security interest in the same account in favor of SP-2, who likewise fails to file a financing statement. This Article takes effect on July 1, 2001. Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 governs priority, and SP-1's security interest has priority under former Section 9-312(5)(b).

Example 3: The facts are as in Example 2, except that, on August 1, 2001, SP-2 files a proper financing statement under this Article. Until August 1, 2001, the relative priorities of the security interests were established before the effective date of this Article, as in Example 2. However, by taking the affirmative step of filing a financing statement, SP-2 established anew the relative priority of the conflicting claims after the effective date. Thus, this Article determines priority. SP-2's security interest has priority under Section 9-322(a)(1).

As Example 3 illustrates, relative priorities that are "established" before the effective date do not necessarily remain unchanged following the effective date. Of course, unlike priority contests among unperfected security interests, some priorities are established permanently, e.g., the rights of a buyer of property who took free of a security interest under former Article 9.

One consequence of the rule in subsection (a) is that the mere taking effect of this Article does not of itself adversely affect the priority of conflicting claims to collateral.

Example 4: In 1999, SP-1 obtains a security interest in a right to payment for lottery

winnings (a "general intangible" as defined in former Article 9 but an "account" as defined in this Article). SP-1's security interest is unperfected because its filed financing statement covers only "accounts." In 2000, D creates a security interest in the same right to payment in favor of SP-2, who files a financing statement covering "accounts and general intangibles." Before this Article takes effect on July 1, 2001, SP-2's perfected security interest has priority over SP-1's unperfected security interest under former 9-312(5). Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 continues to govern priority after this Article takes effect. Thus, SP-2's priority is not adversely affected by this Article's having taken effect.

Note that were this Article to govern priority, SP-2 would become subordinated to SP-1 under Section 9-322(a)(1), even though nothing changes other than this Article's having taken effect. Under Section 9-704, SP-1's security interest would become perfected; the financing statement covering "accounts" adequately covers the lottery winnings and complies with the other perfection requirements of this Article, e.g., it is filed in the proper office.

Example 5: In 1999, SP-1 obtains a security interest in a right to payment for lottery winnings — a "general intangible" (as defined under former Article 9). SP-1's security interest is unperfected because its filed financing statement covers only "accounts." In 2000, D creates a security interest in the same right to payment in favor of SP-2, who makes the same mistake and also files a financing statement covering only "accounts." Before this Article takes effect on July 1, 2001, SP-1's unperfected security interest has priority over SP-2's unperfected security interest, because SP-1's security interest was the first to attach. See former Section 9-312(5)(b). Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 continues to govern priority after this Article takes effect. Although Section 9-704 makes both security interests perfected for purposes of this Article, both are unperfected under former Article 9, which determines their relative priorities.

2. Financing Statements Ineffective Under Former Article 9 but Effective Under This Article. If this Article determines

priority, subsection (b) may apply. It deals with the case in which a filing that occurs before the effective date of this Article would be ineffective to perfect a security interest under former Article 9 but effective under this Article. For purposes of Section 9-322(a), the priority of a security interest that attaches after this Article takes effect and is perfected in this manner dates from the time this Article takes effect.

Example 6: In 1999, SP-1 obtains a security interest in D's existing and after-acquired instruments and files a financing statement covering "instruments." In 2000, D grants a security interest in its existing and after-acquired accounts in favor of SP-2, who files a financing statement covering "accounts." After this Article takes effect on July 1, 2001, one of D's account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in Section 9-322(a), SP-1 would have priority in the instrument, which constitutes SP-2's proceeds. SP-1's filing in 1999 was earlier than SP-2's in 2000. However, subsection (b) provides that, for purposes of Section 9-322(a), SP-1's priority dates from

the time this Article takes effect (July 1, 2001). Under Section 9-322(b), SP-2's priority with respect to the proceeds (instrument) dates from its filing as to the original collateral (accounts). Accordingly, SP-2's security interest would be senior.

Subsection (b) does not apply to conflicting security interests each of which is perfected by a pre-effective-date filing that was not effective under former Article 9 but is effective under this Article.

Example 7: In 1999, SP-1 obtains a security interest in D's existing and after-acquired instruments and files a financing statement covering "instruments." In 2000, D grants a security interest in its existing and after-acquired instruments in favor of SP-2, who files a financing statement covering "instruments." After this Article takes effect on July 1, 2001, one of D's account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in Section 9-322(a), SP-1 would have priority in the instrument. Both filings are effective under this Article, see Section 9-705(b), and SP-1's filing in 1999 was earlier than SP-2's in 2000. Subsection (b) does not change this result.

PART 8. TRANSITION PROVISIONS FOR 2011 AMENDMENTS

28-9-801. [Reserved.]

History.

I.C., § 28-9-801, as added by 2012, ch. 145, § 20, p. 381.

STATUTORY NOTES

Compiler's Notes.

In the uniform code, this section relates to

the effective date of the 2010 revision of Article 9.

OFFICIAL COMMENT

These transition provisions largely track the provisions of Part 7, which govern the transition to the 1998 revision of this Article. The Comments to the sections of Part 7 generally are relevant to the corresponding sections of Part 8. The 2010 amendments are less far-reaching than the 1998 revision. Although Part 8 does not carry forward those Part 7 provisions that clearly would have no application to the transition to the amendments, as a matter of prudence Part 8 does carry forward all Part 7 provisions that are even arguably relevant to the transition.

The most significant transition problem raised by the 2010 amendments arises from changes to Section 9-503(a), concerning the name of the debtor that must be provided for

a financing statement to be sufficient. Sections 9-805 and 9-806 address this problem.

Example: On November 8, 2012, Debtor, an individual whose "individual name" is "Lon Debtor" and whose principal residence is located in State A, creates a security interest in certain manufacturing equipment. On November 15, 2012, SP perfects a security interest in the equipment under Article 9 (as in effect prior to the 2010 amendments) by filing a financing statement against "Lon Debtor" in the State A filing office. On July 1, 2013, the 2010 amendments, including Alternative A to Section 9-503(a), take effect in State A. Debtor's unexpired State A driver's indicates that Debtor's name is "Polonius Debtor." Assuming that a search under "Polonius Debtor" using

the filing office's standard search logic would not disclose the filed financing statement, the financing statement would be insufficient under amended Section 9-503(a)(4) (Alt. A). However, Section 9-805(b) provides that the 2010 amendments do not render the financing statement ineffective. Rather, the financing statement remains effective-even if it has become seriously misleading-until it would have ceased to be effective had the amendments not taken effect. See Section 9-805(b)(1). SP can continue the effectiveness of the financing statement by filing a continuation statement with the State A filing office. To do so, however, SP must amend Debtor's

name on the financing statement to provide the name that is sufficient under Section 9-503(a)(4) (Alt. A) at the time the continuation statement is filed. See Section 9-805(c), (e).

The most significant transition problem addressed by the 1998 revision arose from the change in the choice-of-law rules governing where to file a financing statement. The 2010 amendments do not change the choice-of-law rules. Even so, the amendments will change the place to file in a few cases, because certain entities that were not previously classified as "registered organizations" would fall within that category under the amendments.

28-9-802. Savings clause. — (a) Except as otherwise provided in this part, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this act takes effect.

(b) This act does not affect an action, case, or proceeding commenced before this act takes effect.

History.

I.C., § 28-9-802, as added by 2012, ch. 145, § 20, p. 381.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, ch. 145, which is codified as §§ 28-9-102, 28-9-105, 28-9-307, 28-9-311, 28-9-316, 28-9-317, 28-9-326, 28-9-406, 28-9-408, 28-9-502, 28-9-503, 28-9-507, 28-9-515 to 28-9-516A, 28-9-518, 28-9-521, 28-9-607, 28-9-801 to 28-9-809, and 28-12-103.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

28-9-803. Security interest perfected before effective date. — (a) A security interest that is a perfected security interest immediately before this act takes effect is a perfected security interest under this chapter as amended by this act if, when this act takes effect, the applicable requirements for attachment and perfection under this chapter as amended by this act are satisfied without further action.

(b) Except as otherwise provided in section 28-9-805, Idaho Code, if, immediately before this act takes effect, a security interest is a perfected security interest, but the applicable requirements for perfection under this chapter as amended by this act are not satisfied when this act takes effect, the security interest remains perfected thereafter only if the applicable requirements for perfection under this chapter as amended by this act are satisfied within one (1) year after this act takes effect.

History.

I.C., § 28-9-803, as added by 2012, ch. 145, § 20, p. 381.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, ch. 145, which is codified as §§ 28-9-102, 28-9-105, 28-9-307, 28-9-311, 28-9-316, 28-9-317, 28-9-326, 28-9-406, 28-9-408, 28-9-502, 28-9-503, 28-9-507, 28-9-515 to 28-9-516A, 28-9-518, 28-9-521, 28-9-607, 28-9-801 to 28-9-809, and 28-12-103.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

28-9-804. Security interest unperfected before effective date. — A security interest that is an unperfected security interest immediately before this act takes effect becomes a perfected security interest:

(1) Without further action, when this act takes effect if the applicable requirements for perfection under this chapter as amended by this act are satisfied before or at that time; or

(2) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

History.

I.C., § 28-9-804, as added by 2012, ch. 145, § 20, p. 381.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, ch. 145, which is codified as §§ 28-9-102, 28-9-105, 28-9-307, 28-9-311, 28-9-316, 28-9-317, 28-9-326, 28-9-406, 28-9-408, 28-9-502, 28-9-503, 28-9-507, 28-9-515 to 28-9-516A, 28-9-518, 28-9-521, 28-9-607, 28-9-801 to 28-9-809, and 28-12-103.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

28-9-805. Effectiveness of action taken before effective date. — (a) The filing of a financing statement before this act takes effect is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this chapter as amended by this act.

(b) This act does not render ineffective an effective financing statement that, before this act takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in this chapter as it existed before amendment. However, except as otherwise provided in subsections (c) and (d) of this section and section 28-9-806, Idaho Code, the financing statement ceases to be effective:

(1) If the financing statement is filed in this state, at the time the financing statement would have ceased to be effective had this act not taken effect; or

(2) If the financing statement is filed in another jurisdiction, at the earlier of:

(A) the time the financing statement would have ceased to be effective under the law of that jurisdiction; or

(B) June 30, 2018.

(c) The filing of a continuation statement after this act takes effect does not continue the effectiveness of the financing statement filed before this act takes effect. However, upon the timely filing of a continuation statement after this act takes effect and in accordance with the law of the jurisdiction governing perfection as provided in this chapter as amended by this act, the effectiveness of a financing statement filed in the same office in that jurisdiction before this act takes effect continues for the period provided by the law of that jurisdiction.

(d) Subsection (b)(2)(B) of this section applies to a financing statement that, before this act takes effect, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in this chapter as it existed before amendment, only to the extent that this chapter as amended by this act provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(e) A financing statement that includes a financing statement filed before this act takes effect and a continuation statement filed after this act takes effect is effective only to the extent that it satisfies the requirements of part 5 of this chapter as amended by this act for an initial financing statement. A financing statement that indicates that the debtor is a decedent's estate indicates that the collateral is being administered by a personal representative within the meaning of section 28-9-503(a)(2), Idaho Code, as amended by this act. A financing statement that indicates that the debtor is a trust or is a trustee acting with respect to property held in trust indicates that the collateral is held in a trust within the meaning of section 28-9-503(a)(3), Idaho Code, as amended by this act.

History.

I.C., § 28-9-805, as added by 2012, ch. 145,
§ 20, p. 381.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, ch. 145, which is codified as §§ 28-9-102, 28-9-105, 28-9-307, 28-9-311, 28-9-316, 28-9-317, 28-9-326, 28-9-406, 28-9-408, 28-9-502, 28-9-503, 28-9-507, 28-9-515 to 28-9-516A, 28-9-518, 28-9-521, 28-9-607, 28-9-801 to 28-9-809, and 28-12-103.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

28-9-806. When initial financing statement suffices to continue effectiveness of financing statement. — (a) The filing of an initial financing statement in the office specified in section 28-9-501, Idaho Code, continues the effectiveness of a financing statement filed before this act takes effect if:

(1) The filing of an initial financing statement in that office would be

effective to perfect a security interest under this chapter as amended by this act;

(2) The pre-effective-date financing statement was filed in an office in another state; and

(3) The initial financing statement satisfies subsection (c) of this section.

(b) The filing of an initial financing statement under subsection (a) of this section continues the effectiveness of the pre-effective-date financing statement:

(1) If the initial financing statement is filed before this act takes effect, for the period provided in unamended section 28-9-515, Idaho Code, with respect to an initial financing statement; and

(2) If the initial financing statement is filed after this act takes effect, for the period provided in section 28-9-515, Idaho Code, as amended by this act with respect to an initial financing statement.

(c) To be effective for purposes of subsection (a) of this section, an initial financing statement must:

(1) Satisfy the requirements of part 5 of this chapter as amended by this act for an initial financing statement;

(2) Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective-date financing statement remains effective.

History.

I.C., § 28-9-806, as added by 2012, ch. 145,
§ 20, p. 381.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, ch. 145, which is codified as §§ 28-9-102, 28-9-105, 28-9-307, 28-9-311, 28-9-316, 28-9-317, 28-9-326, 28-9-406, 28-9-408, 28-9-502, 28-9-503, 28-9-507, 28-9-515 to 28-9-516A, 28-9-518, 28-9-521, 28-9-607, 28-9-801 to 28-9-809, and 28-12-103.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

28-9-807. Amendment of pre-effective-date financing statement.

— (a) In this section, "pre-effective-date financing statement" means a financing statement filed before this act takes effect.

(b) After this act takes effect, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in this chapter as amended by this act. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accor-

dance with the law of the jurisdiction in which the financing statement is filed.

(c) Except as otherwise provided in subsection (d) of this section, if the law of this state governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after this act takes effect only if:

- (1) The pre-effective-date financing statement and an amendment are filed in the office specified in section 28-9-501, Idaho Code;
- (2) An amendment is filed in the office specified in section 28-9-501, Idaho Code, concurrently with, or after the filing in that office of, an initial financing statement that satisfies section 28-9-806(c), Idaho Code; or
- (3) An initial financing statement that provides the information as amended and satisfies section 28-9-806(c), Idaho Code, is filed in the office specified in section 28-9-501, Idaho Code.

(d) If the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under section 28-9-805(c) and (e) or 28-9-806, Idaho Code.

(e) Whether or not the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in this state may be terminated after this act takes effect by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies section 28-9-806(c), Idaho Code, has been filed in the office specified by the law of the jurisdiction governing perfection as provided in this chapter as amended by this act as the office in which to file a financing statement.

History.

I.C., § 28-9-807, as added by 2012, ch. 145,
§ 20, p. 381.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, ch. 145, which is codified as §§ 28-9-102, 28-9-105, 28-9-307, 28-9-311, 28-9-316, 28-9-317, 28-9-326, 28-9-406, 28-9-408, 28-9-502, 28-9-503, 28-9-507, 28-9-515 to 28-9-516A, 28-9-518, 28-9-521, 28-9-607, 28-9-801 to 28-9-809, and 28-12-103.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

28-9-808. Person entitled to file initial financing statement or continuation statement. — A person may file an initial financing statement or a continuation statement under this part if:

- (1) The secured party of record authorizes the filing; and
- (2) The filing is necessary under this part:
 - (A) to continue the effectiveness of a financing statement filed before this act takes effect; or
 - (B) to perfect or continue the perfection of a security interest.

History.

I.C., § 28-9-808, as added by 2012, ch. 145,
§ 20, p. 381.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 2012, ch. 145, which is codified as §§ 28-9-102, 28-9-105, 28-9-307, 28-9-311, 28-9-316, 28-9-317, 28-9-326, 28-9-406, 28-9-408, 28-9-502, 28-9-503, 28-9-507, 28-9-515 to 28-9-516A, 28-9-518, 28-9-521, 28-9-607, 28-9-801 to 28-9-809, and 28-12-103.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

28-9-809. Priority. — This act determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before this act takes effect, this chapter as it existed before amendment determines priority.

History.

I.C., § 28-9-809, as added by 2012, ch. 145,
§ 20, p. 381.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 2012, ch. 145, which is codified as §§ 28-9-102, 28-9-105, 28-9-307, 28-9-311, 28-9-316, 28-9-317, 28-9-326, 28-9-406, 28-9-408, 28-9-502, 28-9-503, 28-9-507, 28-9-515 to 28-9-516A, 28-9-518, 28-9-521, 28-9-607, 28-9-801 to 28-9-809, and 28-12-103.

Effective Dates.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

CHAPTER 10

UNIFORM COMMERCIAL CODE — EFFECTIVE DATE AND REPEALER

SECTION.

28-10-101. Effective date.

28-10-102. Specific repealer — Provision for transition.

SECTION.

28-10-103. General repealer.

28-10-104. Laws not repealed. [Repealed.]

28-10-101. Effective date. — (1) Except as provided in subsection (2) of this section, this act shall become effective at midnight on December 31, 1967.

(2) Section 28-9-408[, Idaho Code,] of this act shall become effective at 8:00 A.M. on December 26, 1967.

(3) Except as provided in subsection (2) above and in section 28-9-408[, Idaho Code], this act applies to transactions entered into and events occurring after midnight on December 31, 1967.

History.

1967, ch. 161, § 10-101, p. 351.

STATUTORY NOTES

Compiler's Notes.

The official comments in chapters 1 to 12 of this title are copyrighted by the National Conference of Commissioners of Uniform State Laws and the American Law Institute and are reproduced by permission.

The words "this act" refer to S.L. 1967, ch. 161, compiled as chs. 1 to 10 of this title.

The bracketed insertions in subsections (2) and (3) were added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

Cited in: *Adair v. Freeman*, 92 Idaho 773, 451 P.2d 519 (1969); *Pern v. Stocks*, 93 Idaho 866, 477 P.2d 108 (1970); *Thompson v. Dalton*,

95 Idaho 785, 520 P.2d 240 (1974); *Commercial Credit Corp. v. Chisholm Bros. Farm Equip. Co.*, 96 Idaho 194, 525 P.2d 976 (1974).

RESEARCH REFERENCES

Am. Jur. — 15A Am. Jur. 2d, Commercial Code, § 9.

OFFICIAL COMMENT

This effective date is suggested so that there may be ample time for all those who will be affected by the provisions of the Code to become familiar with them.

28-10-102. Specific repealer — Provision for transition. — (1) The following acts and parts of acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

- (a)(i) Chapter 15 of title 26, Idaho Code, as amended;
- (ii) Chapters 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (as amended), 11, 12, 13, 14, 15, 16 and 17 of title 27, Idaho Code;
- (iii) Chapter 4 of title 30, Idaho Code;
- (iv) Chapter 11 of title 45, Idaho Code, as amended, except section 45-1102;
- (v) Chapter 12 of title 45, Idaho Code;
- (vi) Chapter 14 of title 45, Idaho Code;
- (vii) Chapter 6 of title 62, Idaho Code;
- (viii) Chapters 1, 2, 3, 4, 5 and 6 of title 64, Idaho Code;
- (ix) Chapter 7 of title 64, Idaho Code;
- (x) Chapter 8 of title 64, Idaho Code, as amended;
- (xi) Chapter 9 of title 64, Idaho Code, as amended;
- (xii) Chapter 10 of title 64, Idaho Code; and
- (xiii) Chapter 1 of title 69, Idaho Code, as amended.
- (b) Sections 9-505(4), 18-3705, 26-1003, 26-1005, 26-1006, 26-1008, 26-1013, 26-1015, 26-1016 and 45-1301, Idaho Code.

(2) Transactions validly entered into before the effective date specified in section 28-10-101[, Idaho Code,] and the rights, duties and interests flowing therefrom remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this act as though such repeal or amendment had not occurred.

History.

1967, ch. 161, § 10-102, p. 351.

STATUTORY NOTES**Compiler's Notes.**

The words "this act" refer to S.L. 1967, ch. 161, generally compiled as chs. 1 to 10 to this title.

The bracketed insertion in subsection (2) was added by the compiler to conform to the statutory citation style.

The above section is set out as it appeared in the original bill as amended in the senate. However, in the enrolled bill, the senate amendment which added subsection (2) following subsection (1), was inserted immediately preceding the line beginning (a)(i) rather than at the end of subsection (1).

JUDICIAL DECISIONS**Statutes Inconsistent with UCC.**

Any statute or part of a statute that is inconsistent with the UCC is repealed, even if it is more specific than the UCC. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990).

Section 45-805, so far as it relates to warehouse liens, was repealed by the enactment of § 28-7-209, because § 45-805 is not listed in subsection (1) of this section as one of the statutes specifically repealed by the UCC, and

§ 45-805 is inconsistent with § 28-7-209, and the exception to repeal by implication contained in § 28-10-104(1) [now repealed] does not apply to the repeal of § 45-805 so far as it relates to warehouse liens. *Curry Grain Storage, Inc. v. Hesston Corp.*, 120 Idaho 328, 815 P.2d 1068 (1991).

Cited in: *Commercial Credit Corp. v. Chisholm Bros. Farm Equip. Co.*, 96 Idaho 194, 525 P.2d 976 (1974).

RESEARCH REFERENCES

Am. Jur. — 15A Am. Jur. 2d, Commercial Code, §§ 9, 10.

67 Am. Jur. 2d, Sales, §§ 1 to 4.
78 Am. Jur. 2d, Warehouses, § 1 et seq.

OFFICIAL COMMENT

Subsection (1) provides for the repeal of present uniform and other acts superseded by

this Act. Subsection (2) provides for the transition to the Code.

28-10-103. General repealer. — Except as provided in the following section, all acts and parts of acts inconsistent with this act are hereby repealed.

History.

1967, ch. 161, § 10-103, p. 351.

STATUTORY NOTES**Compiler's Notes.**

The words "this act" refer to S.L. 1967, ch.

161, generally compiled as chs. 1 to 10 of this title.

JUDICIAL DECISIONS**Statutes Inconsistent with UCC.**

Section 45-805, so far as it relates to warehouse liens, was repealed by the enactment of § 28-7-209, because § 45-805 is not listed in § 28-10-102(1) as one of the statutes specifi-

cally repealed by the UCC, and § 45-805 is inconsistent with § 28-7-209, and the exception to repeal by implication contained in § 28-10-104(1) [now repealed] does not apply to the repeal of § 45-805 so far as it relates to

warehouse liens. *Curry Grain Storage, Inc. v. Hesston Corp.*, 120 Idaho 328, 815 P.2d 1068 (1991).

RESEARCH REFERENCES

Am. Jur. — 15A Am. Jur. 2d, Commercial Code, §§ 9, 10. 78 Am. Jur. 2d, Warehouses, § 1 et seq.

OFFICIAL COMMENT

This section provides for the repeal of all other legislation inconsistent with this Act.

28-10-104. Laws not repealed. [Repealed.]

STATUTORY NOTES

Compiler's Notes. This section, which comprised 1967, ch. 161, § 10-104, p. 351; am. 1995, ch. 272, § 20, p. 873, was repealed by S.L. 2004, ch. 42, § 33.

CHAPTER 11

ARTISTS AND ART DEALERS

PART 1. ARTIST AND ART DEALER

SECTION.

28-11-101. Definitions.
28-11-102. Artist-art dealer relationship.
28-11-103. Agency relationship — Trust property.

SECTION.

28-11-104. Subsequent sale — Payment to consignor.
28-11-105. Waiver void — Exemption from UCC.
28-11-106. Application.

PART 1. ARTIST AND ART DEALER

28-11-101. Definitions. — As used in this chapter, unless the context requires otherwise, the following definitions apply:

- (1) "Art dealer" means a person engaged in the business of selling works of fine art, other than a person exclusively engaged in the business of selling goods at public auction.
- (2) "Artist" means a person who creates a work of fine art or, if the person is deceased, the person's heir, devisee, or personal representative.
- (3) "Consignment" means that no title to, estate in or right to possession of fine art superior to that of the consignor vests in the consignee, notwithstanding the consignee's power or authority to transfer and convey to a third person all of the right, title and interest of the consignor in and to the fine art.
- (4) "Fine art" means a painting, sculpture, drawing, work of graphic art, including an etching, lithograph, signed limited edition offset print, silk screen, or a work of graphic art of like nature; a work of calligraphy, photographs, original works in ceramics, wood, metals, glass, plastic, wax, stone or leather or a work in mixed media, including a collage, assemblage, or any combination of the art media mentioned in this subsection.

(5) "Person" means an individual, partnership, corporation, association, or other group, however organized.

History.

I.C., § 28-11-101, as added by 1987, ch. 127, § 1, p. 257.

28-11-102. Artist-art dealer relationship. — Notwithstanding any custom, practice or usage of the trade to the contrary, whenever an artist delivers or causes to be delivered a work of fine art of the artist's own creation to an art dealer in this state for the purpose of exhibition and sale on a commission, fee, or other basis of compensation, the delivery to and acceptance of the work of fine art by the art dealer constitutes a consignment, unless the delivery to the art dealer is pursuant to an outright sale for which the artist receives upon delivery or has received prior to delivery full compensation for the work of fine art.

History.

I.C., § 28-11-102, as added by 1987, ch. 127, § 1, p. 257.

28-11-103. Agency relationship — Trust property. — A consignment of a work of fine art results in the following:

(1) The art dealer, after delivery of the work of fine art, is an agent of the artist for the purpose of sale or exhibition of the consigned work of fine art within the state of Idaho. This relationship shall be defined in writing and renewed at least every three (3) years by the art dealer and the artist. It is the responsibility of the artist to identify clearly the work of art by securely attaching identifying marking to or clearly signing the work of art.

(2) The work of fine art constitutes property held in trust by the consignee for the benefit of the consignor and is not subject to claim by a creditor of the consignee.

(3) The consignee is responsible for the loss of or damage to the work of fine art while in the possession of or on the premises of the consignee.

(4) The proceeds from the sale of the work of fine art constitute funds held in trust by the consignee for the benefit of the consignor. The proceeds shall first be applied to pay any balance due to the consignor, unless the consignor expressly agrees otherwise in writing.

History.

I.C., § 28-11-103, as added by 1987, ch. 127, § 1, p. 257.

28-11-104. Subsequent sale — Payment to consignor. — A work of fine art received as a consignment remains trust property, notwithstanding the subsequent purchase thereof by the consignee directly or indirectly for the consignee's own account until the price is paid in full to the consignor. If the work is resold to a bona fide purchaser before the consignor has been paid in full, the proceeds of the resale received by the consignee constitute funds held in trust for the benefit of the consignor to the extent necessary to pay any balance due to the consignor and the trusteeship continues until the

fiduciary obligation of the consignee with respect to the transaction is discharged in full.

History.

I.C., § 28-11-104, as added by 1987, ch. 127, § 1, p. 257.

28-11-105. Waiver void — Exemption from UCC. — (1) Any provision of a contract or agreement by which the consignor waives any provision of this part of this chapter is void.

(2) This part of this chapter is not subject to the provisions of chapters 1 through 10, title 28, Idaho Code.

History.

I.C., § 28-11-105, as added by 1987, ch. 127, § 1, p. 257.

28-11-106. Application. — This part of this chapter does not apply to a written contract executed prior to July 1, 1987, unless:

(1) The parties agree that this part of this chapter will apply; or

(2) The contract is extended or renewed after July 1, 1987.

History.

I.C., § 28-11-106, as added by 1987, ch. 127, § 1, p. 257.

CHAPTER 12

UNIFORM COMMERCIAL CODE — LEASES

PART 1. GENERAL PROVISIONS

SECTION.

28-12-101. Short title.

28-12-102. Scope.

28-12-103. Definitions and index of definitions.

28-12-104. Leases subject to other law.

28-12-105. Territorial application of article to goods covered by certificate of title.

28-12-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

28-12-107. Waiver or renunciation of claim or right after default.

28-12-108. Unconscionability.

28-12-109. Option to accelerate at will.

PART 2. FORMATION AND CONSTRUCTION OF LEASE CONTRACT

28-12-201. Statute of frauds.

28-12-202. Final written expression — Parol or extrinsic evidence.

28-12-203. Seals inoperative.

28-12-204. Formation in general.

28-12-205. Firm offers.

SECTION.

28-12-206. Offer and acceptance in formation of lease contract.

28-12-207. Course of performance or practical construction. [Repealed.]

28-12-208. Modification, rescission and waiver.

28-12-209. Lessee under finance lease as beneficiary of supply contract.

28-12-210. Express warranties.

28-12-211. Warranties against interference and against infringement — Lessee's obligation against infringement.

28-12-212. Implied warranty of merchantability.

28-12-213. Implied warranty of fitness for particular purpose.

28-12-214. Exclusion or modification of warranties.

28-12-215. Cumulation and conflict of warranties express or implied.

28-12-216. Third-party beneficiaries of express and implied warranties.

28-12-217. Identification.

28-12-218. Insurance and proceeds.

28-12-219. Risk of loss.

28-12-220. Effect of default on risk of loss.

SECTION.

28-12-221. Casualty to identified goods.

PART 3. EFFECT OF LEASE CONTRACT

28-12-301. Enforceability of lease contract.

28-12-302. Title to and possession of goods.

28-12-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods — Delegation of performance — Transfer of rights.

28-12-304. Subsequent lease of goods by lessor.

28-12-305. Sale or sublease of goods by lessee.

28-12-306. Priority of certain liens arising by operation of law.

28-12-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

28-12-308. Special rights of creditors.

28-12-309. Lessor's and lessee's rights when goods become fixtures.

28-12-310. Lessor's and lessee's rights when goods become accessions.

28-12-311. Priority subject to subordination.

PART 4. PERFORMANCE OF LEASE CONTRACT —
REPUDIATED, SUBSTITUTED AND EXCUSED

28-12-401. Insecurity — Adequate assurance of performance.

28-12-402. Anticipatory repudiation.

28-12-403. Retraction of anticipatory repudiation.

28-12-404. Substituted performance.

28-12-405. Excused performance.

28-12-406. Procedure on excused performance.

28-12-407. Irrevocable promises — Finance leases.

PART 5. DEFAULT

28-12-501. Default — Procedure.

28-12-502. Notice after default.

28-12-503. Modification or impairment of rights and remedies.

28-12-504. Liquidation of damages.

28-12-505. Cancellation and termination and effect of cancellation, termina-

SECTION.

tion, rescission or fraud on rights and remedies.

28-12-506. Statute of limitations.

28-12-507. Proof of market rent — Time and place.

28-12-508. Lessee's remedies.

28-12-509. Lessee's rights on improper delivery — Rightful rejection.

28-12-510. Installment lease contracts — Rejection and default.

28-12-511. Merchant lessee's duties as to rightfully rejected goods.

28-12-512. Lessee's duties as to rightfully rejected goods.

28-12-513. Cure by lessor of improper tender or delivery — Replacement.

28-12-514. Waiver of lessee's objections.

28-12-515. Acceptance of goods.

28-12-516. Effect of acceptance of goods — Notice of default — Burden of establishing default after acceptance — Notice of claim or litigation to person answerable over.

28-12-517. Revocation of acceptance of goods.

28-12-518. Cover — Substitute goods.

28-12-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.

28-12-520. Lessee's incidental and consequential damages.

28-12-521. Lessee's right to specific performance or replevin.

28-12-522. Lessee's right to goods on lessor's insolvency.

28-12-523. Lessor's remedies.

28-12-524. Lessor's right to identify goods to lease contract.

28-12-525. Lessor's right to possession of goods.

28-12-526. Lessor's stoppage of delivery in transit or otherwise.

28-12-527. Lessor's rights to dispose of goods.

28-12-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.

28-12-529. Lessor's action for the rent.

28-12-530. Lessor's incidental damages.

28-12-531. Standing to sue third parties for injury to goods.

28-12-532. Lessor's rights to residual interest.

PART 1. GENERAL PROVISIONS

28-12-101. Short title. — This chapter shall be known and may be cited as "Uniform Commercial Code-Leases."

History.

I.C., § 28-12-101, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The official comments in chapters 1 to 12 of this title are copyrighted by the National Conference of Commissioners of Uniform State Laws and the American Law Institute and are reproduced by permission.

The numbering of the Idaho version of Article 2A, Leases of the Uniform Commercial Code differs from the numbering of the official version as approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The official version was numbered as §§ 2A-101 through 2A-531. The Idaho Uniform Commercial Code — Leases enacted by S.L. 1993, ch. 287, § 1 is compiled as §§ 28-12-101 through 28-21-531, Idaho Code. In order to facilitate the use of the Official Comments a parallel table has been provided showing the Idaho Code reference to the act in the column labeled "Idaho Code" with its parallel reference in the column labeled "Official Code".

Part 1. General Provisions

| Idaho Code | Uniform Code |
|------------|--------------|
| 28-12-101 | 2A-101 |
| 28-12-102 | 2A-102 |
| 28-12-103 | 2A-103 |
| 28-12-104 | 2A-104 |
| 28-12-105 | 2A-105 |
| 28-12-106 | 2A-106 |
| 28-12-107 | 2A-107 |
| 28-12-108 | 2A-108 |
| 28-12-109 | 2A-109 |

Part 2. Formation and Construction of Lease Contract

| Idaho Code | Uniform Code |
|------------|--------------|
| 28-12-201 | 2A-201 |
| 28-12-202 | 2A-202 |
| 28-12-203 | 2A-203 |
| 28-12-204 | 2A-204 |
| 28-12-205 | 2A-205 |
| 28-12-206 | 2A-206 |
| 28-12-207 | 2A-207 |
| 28-12-208 | 2A-208 |
| 28-12-209 | 2A-209 |
| 28-12-210 | 2A-210 |
| 28-12-211 | 2A-211 |
| 28-12-212 | 2A-212 |
| 28-12-213 | 2A-213 |
| 28-12-214 | 2A-214 |
| 28-12-215 | 2A-215 |
| 28-12-216 | 2A-216 |
| 28-12-217 | 2A-217 |
| 28-12-218 | 2A-218 |
| 28-12-219 | 2A-219 |
| 28-12-220 | 2A-220 |
| 28-12-221 | 2A-221 |

Part 3. Effect of Lease Contract

| Idaho Code | Uniform Code |
|------------|--------------|
| 28-12-301 | 2A-301 |
| 28-12-302 | 2A-302 |
| 28-12-303 | 2A-303 |
| 28-12-304 | 2A-304 |
| 28-12-305 | 2A-305 |
| 28-12-306 | 2A-306 |
| 28-12-307 | 2A-307 |
| 28-12-308 | 2A-308 |
| 28-12-309 | 2A-309 |
| 28-12-310 | 2A-310 |
| 28-12-311 | 2A-311 |

Part 4. Performance of Lease Contract — Repudiated, Substituted and Excused

| Idaho Code | Uniform Code |
|------------|--------------|
| 28-12-401 | 2A-401 |
| 28-12-402 | 2A-402 |
| 28-12-403 | 2A-403 |
| 28-12-404 | 2A-404 |
| 28-12-405 | 2A-405 |
| 28-12-406 | 2A-406 |
| 28-12-407 | 2A-407 |

Part 5. Default

| Idaho Code | Uniform Code |
|------------|--------------|
| 28-12-501 | 2A-501 |
| 28-12-502 | 2A-502 |
| 28-12-503 | 2A-503 |
| 28-12-504 | 2A-504 |
| 28-12-505 | 2A-505 |
| 28-12-506 | 2A-506 |
| 28-12-507 | 2A-507 |
| 28-12-508 | 2A-508 |
| 28-12-509 | 2A-509 |
| 28-12-510 | 2A-510 |
| 28-12-511 | 2A-511 |
| 28-12-512 | 2A-512 |
| 28-12-513 | 2A-513 |
| 28-12-514 | 2A-514 |
| 28-12-515 | 2A-515 |
| 28-12-516 | 2A-516 |
| 28-12-517 | 2A-517 |
| 28-12-518 | 2A-518 |
| 28-12-519 | 2A-519 |
| 28-12-520 | 2A-520 |
| 28-12-521 | 2A-521 |
| 28-12-522 | 2A-522 |
| 28-12-523 | 2A-523 |
| 28-12-524 | 2A-524 |
| 28-12-525 | 2A-525 |
| 28-12-526 | 2A-526 |
| 28-12-527 | 2A-527 |
| 28-12-528 | 2A-528 |
| 28-12-529 | 2A-529 |
| 28-12-530 | 2A-530 |
| 28-12-531 | 2A-531 |

JUDICIAL DECISIONS

Cited in: Posey v. Ford Motor Credit Co.,
141 Idaho 477, 111 P.3d 162 (Ct. App. 2005).

OFFICIAL COMMENT

Rationale for Codification: There are several reasons for codifying the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least three significant issues to be resolved by codification. First, what is a lease? It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases. Yet the distinction between a lease and a security interest disguised as a lease is not clear. Second, will the lessor be deemed to have made warranties to the lessee? If the transaction is a sale the express and implied warranties of Article 2 of the Uniform Commercial Code apply. However, the warranty law with respect to leases is uncertain. Third, what remedies are available to the lessor upon the lessee's default? If the transaction is a security interest disguised as a lease, the answer is stated in Part 5 of the Article on Secured Transactions (Article 9). There is no clear answer with respect to leases.

There are reasons to codify the law with respect to leases of goods in addition to those suggested by a review of the reported cases. The answer to this important question should not be limited to the issues raised in these cases. Is it not also proper to determine the remedies available to the lessee upon the lessor's default? It is, but that issue is not reached through a review of the reported cases. This is only one of the many issues presented in structuring, negotiating and documenting a lease of goods.

Statutory Analogue: After it was decided to proceed with the codification project, the drafting committee of the National Conference of Commissioners on Uniform State Laws looked for a statutory analogue, gradually narrowing the focus to the Article on Sales (Article 2) and the Article on Secured Transactions (Article 9). A review of the literature with respect to the sale of goods reveals that Article 2 is predicated upon certain assumptions: Parties to the sales transaction frequently are without counsel; the agreement of the parties often is oral or evidenced by scant writings; obligations between the parties are bilateral; applicable law is influ-

enced by the need to preserve freedom of contract. A review of the literature with respect to personal property security law reveals that Article 9 is predicated upon very different assumptions: Parties to a secured transaction regularly are represented by counsel; the agreement of the parties frequently is reduced to a writing, extensive in scope; the obligations between the parties are essentially unilateral; and applicable law seriously limits freedom of contract.

The lease is closer in spirit and form to the sale of goods than to the creation of a security interest. While parties to a lease are sometimes represented by counsel and their agreement is often reduced to a writing, the obligations of the parties are bilateral and the common law of leasing is dominated by the need to preserve freedom of contract. Thus the drafting committee concluded that Article 2 was the appropriate statutory analogue.

Issues: The drafting committee then identified and resolved several issues critical to codification:

Scope: The scope of the Article was limited to leases (Section 2A-102). There was no need to include leases intended as security, i.e., security interests disguised as leases, as they are adequately treated in Article 9. Further, even if leases intended as security were included, the need to preserve the distinction would remain, as policy suggests treatment significantly different from that accorded leases.

Definition of Lease: Lease was defined to exclude leases intended as security (Section 2A-103(1)(j)). Given the litigation to date a revised definition of security interest was suggested for inclusion in the Act. (Section 1-201(37)). This revision sharpens the distinction between leases and security interests disguised as leases.

Filing: The lessor was not required to file a financing statement against the lessee or take any other action to protect the lessor's interest in the goods (Section 2A-301). The refined definition of security interest will more clearly signal the need to file to potential lessors of goods. Those lessors who are concerned will file a protective financing statement (Section 9-408).

Warranties: All of the express and implied warranties of the Article on Sales (Article 2) were included (Sections 2A-210 through 2A-216), revised to reflect differences in lease transactions. The lease of goods is sufficiently

similar to the sale of goods to justify this decision. Further, many courts have reached the same decision.

Certificate of Title Laws: Many leasing transactions involve goods subject to certificate of title statutes. To avoid conflict with those statutes, this Article is subject to them (Section 2A-104(1)(a)).

Consumer Leases: Many leasing transactions involve parties subject to consumer protection statutes or decisions. To avoid conflict with those laws this Article is subject to them to the extent provided in (Section 2A-104(1)(c) and (2)). Further, certain consumer protections have been incorporated in the Article.

Finance Leases: Certain leasing transactions substitute the supplier of the goods for the lessor as the party responsible to the lessee with respect to warranties and the like. The definition of finance lease (Section 2A-103(1)(g)) was developed to describe these transactions. Various sections of the Article implement the substitution of the supplier for the lessor, including Sections 2A-209 and 2A-407. No attempt was made to fashion a special rule where the finance lessor is an affiliate of the supplier of goods; this is to be developed by the courts, case by case.

Sale and Leaseback: Sale and leaseback transactions are becoming increasingly common. A number of state statutes treat transactions where possession is retained by the seller as fraudulent *per se* or *prima facie* fraudulent. That position is not in accord with modern practice and thus is changed by the Article "if the buyer bought for value and in good faith" (Section 2A-308(3)).

Remedies: The Article has not only provided for lessor's remedies upon default by the lessee (Sections 2A-523 through 2A-531), but also for lessee's remedies upon default by the lessor (Sections 2A-508 through 2A-522). This is a significant departure from Article 9, which provides remedies only for the secured party upon default by the debtor. This difference is compelled by the bilateral nature of the obligations between the parties to a lease.

Damages: Many leasing transactions are predicated on the parties' ability to stipulate an appropriate measure of damages in the event of default. The rule with respect to sales of goods (Section 2-718) is not sufficiently flexible to accommodate this practice. Consistent with the common law emphasis upon freedom to contract, the Article has created a revised rule that allows greater flexibility with respect to leases of goods (Section 2A-504(1)).

History: This Article is a revision of the Uniform Personal Property Leasing Act, which was approved by the National Conference of Commissioners on Uniform State Laws in August, 1985. However, it was believed that the subject matter of the Uniform

Personal Property Leasing Act would be better treated as an article of this Act. Thus, although the Conference promulgated the Uniform Personal Property Leasing Act as a Uniform Law, activity was held in abeyance to allow time to restate the Uniform Personal Property Leasing Act as Article 2A.

In August, 1986 the Conference approved and recommended this Article (including conforming amendments to Article 1 and Article 9) for promulgation as an amendment to this Act. In December, 1986 the Council of the American Law Institute approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act. In March, 1987 the Permanent Editorial Board for the Uniform Commercial Code approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act. In May, 1987 the American Law Institute approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act. In August, 1987 the Conference confirmed its approval of the final text of this Article.

Upon its initial promulgation, Article 2A was rapidly enacted in several states, was introduced in a number of other states, and underwent bar association, law revision commission and legislative study in still further states. In that process debate emerged, principally sparked by the study of Article 2A by the California Bar Association, California's non-uniform amendments to Article 2A, and articles appearing in a symposium on Article 2A published after its promulgation in the Alabama Law Review. The debate chiefly centered on whether Article 2A had struck the proper balance or was clear enough concerning the ability of a lessor to grant a security interest in its leasehold interest and in the residual, priority between a secured party and the lessee, and the lessor's remedy structure under Article 2A.

This debate over issues on which reasonable minds could and did differ began to affect the enactment effort for Article 2A in a deleterious manner. Consequently, the Standby Committee for Article 2A, composed predominantly of the former members of the drafting committee, reviewed the legislative actions and studies in the various states, and opened a dialogue with the principal proponents of the non-uniform amendments. Negotiations were conducted in conjunction with, and were facilitated by, a study of the uniform Article and the non-uniform Amendments by the New York Law Revision Commission. Ultimately, a consensus was reached, which has

been approved by the membership of the Conference, the Permanent Editorial Board, and the Council of the Institute. Rapid and uniform enactment of Article 2A is expected as a result of the completed amendments. The Article 2A experience reaffirms the essential viability of the procedures of the Conference and the Institute for creating and updating uniform state law in the commercial law area.

Relationship of Article 2A to Other Articles: The Article on Sales provided a useful point of reference for codifying the law of leases. Many of the provisions of that Article were carried over, changed to reflect differences in style, leasing terminology or leasing practices. Thus, the official comments to those sections of Article 2 whose provisions were carried over are incorporated by reference in Article 2A, as well; further, any case law interpreting those provisions should be viewed as persuasive but not binding on a court when deciding a similar issue with respect to leases. Any change in the sequence that has been made when carrying over a provision from Article 2 should be viewed as a matter of style, not substance. This is not to suggest that in other instances Article 2A did not also incorporate substantially revised provisions of Article 2, Article 9 or otherwise where the revision was driven by a concern over the substance; but for the lack of a mandate, the drafting committee might well have made the same or a similar change in

the statutory analogue. Those sections in Article 2A include Sections 2A-104, 2A-105, 2A-106, 2A-108(2) and (4), 2A-109(2), 2A-208, 2A-214(2) and (3)(a), 2A-216, 2A-303, 2A-306, 2A-503, 2A-504(3)(b), 2A-506(2), and 2A-515. For lack of relevance or significance not all of the provisions of Article 2 were incorporated in Article 2A.

This codification was greatly influenced by the fundamental tenet of the common law as it has developed with respect to leases of goods: freedom of the parties to contract. Note that, like all other Articles of this Act, the principles of construction and interpretation contained in Article 1 are applicable throughout Article 2A (Section 2A-103(4)). These principles include the ability of the parties to vary the effect of the provisions of Article 2A, subject to certain limitations including those that relate to the obligations of good faith, diligence, reasonableness and care (Section 1-102(3)). Consistent with those principles no negative inference is to be drawn by the episodic use of the phrase "unless otherwise agreed" in certain provisions of Article 2A. Section 1-102(4). Indeed, the contrary is true, as the general rule in the Act, including this Article, is that the effect of the Act's provisions may be varied by agreement. Section 1-102(3). This conclusion follows even where the statutory analogue contains the phrase and the correlative provision in Article 2A does not.

28-12-102. Scope. — This chapter applies to any transaction, regardless of form, that creates a lease.

History.

I.C., § 28-12-102, as added by 1993, ch. 287, § 1, p. 287.

RESEARCH REFERENCES

Am. Jur. — 17A Am. Jur. 2d, Contracts, § 1 et seq.

C.J.S. — 17 C.J.S., Contracts, § 1 et seq.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-102(1). Throughout this Article, unless otherwise stated, references to "Section" are to other sections of this Act.

Changes: Substantially revised.

Purposes: This Article governs transactions as diverse as the lease of a hand tool to an individual for a few hours and the leveraged lease of a complex line of industrial equipment to a multi-national organization for a number of years.

To achieve that end it was necessary to provide that this Article applies to any transaction, regardless of form, that creates a

lease. Since lease is defined as a transfer of an interest in goods (Section 2A-103(1)(j)) and goods is defined to include fixtures (Section 2A-103(1)(h)), application is limited to the extent the transaction relates to goods, including fixtures. Further, since the definition of lease does not include a sale (Section 2-106(1)) or retention or creation of a security interest (Section 1-201(37)), application is further limited; sales and security interests are governed by other Articles of this Act.

Finally, in recognition of the diversity of the transactions to be governed, the sophistication of many of the parties to these transac-

tions, and the common law tradition as it applies to the bailment for hire or lease, freedom of contract has been preserved. DeKoven, *Proceedings After Default by the Lessee Under a True Lease of Equipment*, in 1C P. Coogan, W. Hogan, D. Vagts, *Secured Transactions Under the Uniform Commercial Code*, § 29B.02[2] (1986). Thus, despite the extensive regulatory scheme established by this Article, the parties to a lease will be able to create private rules to govern their transaction. Sections 2A-103(4) and 1-102(3). However, there are special rules in this Article governing consumer leases, as well as other state and federal statutes, that may further limit freedom of contract with respect to consumer leases.

A court may apply this Article by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods, taking into account the expressed intentions of the parties to the transaction and any differences between a lease of goods and a lease of other property. Such application has precedent as the provisions of the Article on

Sales (Article 2) have been applied by analogy to leases of goods. *E.g.*, Hawkland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 Ill. L.F. 446; Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 Fordham L. Rev. 447 (1971). Whether such application would be appropriate for other bailments of personal property, gratuitous or for hire, should be determined by the facts of each case. *See Mieske v. Bartell Drug Co.*, 92 Wash.2d 40, 46-48, 593 P.2d 1308, 1312 (1979).

Further, parties to a transaction creating a lease of personal property other than goods, or a bailment of personal property may provide by agreement that this Article applies. Upholding the parties' choice is consistent with the spirit of this Article.

Cross References: Sections 1-102(3), 1-201(37), Article 2, esp. Section 2-106(1), and Sections 2A-103(1)(h), 2A-103(1)(j) and 2A-103(4).

Definitional Cross Reference: "Lease". Section 2A-103(1)(j).

28-12-103. Definitions and index of definitions. — (1) In this chapter unless the context otherwise requires:

- (a) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
- (b) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.
- (c) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.
- (d) "Conforming goods or performance under a lease contract" means goods or performance that is in accordance with the obligations under the lease contract.
- (e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed twenty-five thousand dollars (\$25,000).
- (f) "Fault" means wrongful act, omission, breach or default.

- (g) "Finance lease" means a lease with respect to which:
- (i) The lessor does not select, manufacture, or supply the goods;
 - (ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and
 - (iii) One (1) of the following occurs:
 - (A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;
 - (B) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;
 - (C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or
 - (D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing:
 - a. Of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person;
 - b. That the lessee is entitled under this chapter to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; and
 - c. That the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.
- (h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (section 28-12-309, Idaho Code), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.
- (i) "Installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.
- (j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(l) "Lease contract" means the total legal obligation that results from the lease agreement as affected by this chapter and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.

(n) "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.

(o) "Lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination or cancellation of the lease contract.

(r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) "Present value" means the amount as of a date certain of one (1) or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this chapter and the sections in which they appear are:

"Accessions." section 28-12-310(1), Idaho Code.

"Construction mortgage." section 28-12-309(1)(d), Idaho Code.

"Encumbrance." section 28-12-309(1)(e), Idaho Code.

"Fixtures." section 28-12-309(1)(a), Idaho Code.

"Fixture filing." section 28-12-309(1)(b), Idaho Code.

"Purchase money lease." section 28-12-309(1)(c), Idaho Code.

(3) The following definitions in other chapters apply to this chapter:

"Account." section 28-9-102(a)(2), Idaho Code.

"Between merchants." section 28-2-104(3), Idaho Code.

"Buyer." section 28-2-103(1)(a), Idaho Code.

"Chattel paper." section 28-9-102(a)(11), Idaho Code.

"Consumer goods." section 28-9-102(a)(23), Idaho Code.

"Document." section 28-9-102(a)(30), Idaho Code.

"Entrusting." section 28-2-403(3), Idaho Code.

"General intangible." section 28-9-102(a)(42), Idaho Code.

"Good faith." section 28-1-201(b)(20), Idaho Code.

"Instrument." section 28-9-102(a)(47), Idaho Code.

"Merchant." section 28-2-104(1), Idaho Code.

"Mortgage." section 28-9-102(a)(55), Idaho Code.

"Pursuant to commitment." section 28-9-102(a)(69), Idaho Code.

"Receipt." section 28-2-103(1)(c), Idaho Code.

"Sale." section 28-2-106(1), Idaho Code.

"Sale on approval." section 28-2-326, Idaho Code.

"Sale or return." section 28-2-326, Idaho Code.

"Seller." section 28-2-103(1)(d), Idaho Code.

(4) In addition, chapter 1, title 28, contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History.

I.C., § 28-12-103, as added by 1993, ch. 287, § 1, p. 977; am. 2001, ch. 208, § 20, p.

704; am. 2004, ch. 42, § 15, p. 77; am. 2004, ch. 43, § 36, p. 136; am. 2012, ch. 145, § 21, p. 381.

STATUTORY NOTES

Amendments.

This section was amended by two 2004 acts which appear to be compatible and have been compiled together.

The 2004 amendment, by ch. 42, substi-

tuted "acquiring" for "receiving" in subsections (1)(a) and (1)(o) and substituted "is" for "are" in subsection (1)(d).

The 2004 amendment, by ch. 43, substituted "is" for "are" in subsection (1)(d) and, in

subsection (3), for the definition location of “good faith” substituted “28-1-201(b)(20)” for “28-1-201(19).”

The 2012 amendment, by ch. 145, updated a reference to section 28-9-102 in subsection (3), in light of the 2012 amendment of that section.

Compiler’s Notes.

The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

Cited in: Mickelsen v. Broadway Ford, Inc.,
— Idaho —, 280 P.3d 176 (2012).

OFFICIAL COMMENT

(a) “Buyer in ordinary course of business”. Section 1-201(b)(9).

(b) “Cancellation”. Section 2-106(4). The effect of a cancellation is provided in Section 2A-505(1).

(c) “Commercial unit”. Section 2-105(6).

(d) “Conforming”. Section 2-106(2).

(e) “Consumer lease”. New. This Article includes a subset of rules that applies only to consumer leases. Sections 2A-106, 2A-108(2), 2A-108(4), 2A-109(2), 2A-221, 2A-309, 2A-406, 2A-407, 2A-504(3)(b), and 2A-516(3)(b).

For a transaction to qualify as a consumer lease it must first qualify as a lease. Section 2A-103(1)(j). Note that this Article regulates the transactional elements of a lease, including a consumer lease; consumer protection statutes, present and future, and existing consumer protection decisions are unaffected by this Article. Section 2A-104(1)(c) and (2). Of course, Article 2A as state law also is subject to federal consumer protection law.

This definition is modeled after the definition of consumer lease in the Consumer Leasing Act, 15 U.S.C. § 1667 (1982), and in the Unif. Consumer Credit Code § 1.301(14), 7A U.L.A. 43 (1974). However, this definition of consumer lease differs from its models in several respects: the lessor can be a person regularly engaged either in the business of leasing or of selling goods, the lease need not be for a term exceeding four months, a lease primarily for an agricultural purpose is not covered, and whether there should be a limitation by dollar amount and its amount is left up to the individual states.

This definition focuses on the parties as well as the transaction. If a lease is within this definition, the lessor must be regularly engaged in the business of leasing or selling, and the lessee must be an individual not an organization; note that a lease to two or more individuals having a common interest through marriage or the like is not excluded

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

Section 22 of S.L. 2012, ch 145 provided that the act should take effect on and after July 1, 2013.

as a lease to an organization under Section 1-201(28). The lessee must take the interest primarily for a personal, family or household purpose. If required by the enacting state, total payments under the lease contract, excluding payments for options to renew or buy, cannot exceed the figure designated.

(f) “Fault”. Section 1-201(16).

(g) “Finance Lease”. New. This Article includes a subset of rules that applies only to finance leases. Sections 2A-209, 2A-211(2), 2A-212(1), 2A-213, 2A-219(1), 2A-220(1)(a), 2A-221, 2A-405(c), 2A-407, 2A-516(2) and 2A-517(1)(a) and (2).

For a transaction to qualify as a finance lease it must first qualify as a lease. Section 2A-103(1)(j). Unless the lessor is comfortable that the transaction will qualify as a finance lease, the lease agreement should include provisions giving the lessor the benefits created by the subset of rules applicable to the transaction that qualifies as a finance lease under this Article.

A finance lease is the product of a three-party transaction. The supplier manufactures or supplies the goods pursuant to the lessee’s specification, perhaps even pursuant to a purchase order, sales agreement or lease agreement between the supplier and the lessee. After the prospective finance lease is negotiated, a purchase order, sales agreement, or lease agreement is entered into by the lessor (as buyer or prime lessee) or an existing order, agreement or lease is assigned by the lessee to the lessor, and the lessor and the lessee then enter into a lease or sublease of the goods. Due to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties. If a manufacturer’s warranty carries through, the lessee may also look to that. Yet, this definition does not restrict the lessor’s function solely to the supply of funds; if the lessor undertakes or performs other

functions, express warranties, covenants and the common law will protect the lessee.

This definition focuses on the transaction, not the status of the parties; to avoid confusion it is important to note that in other contexts, e.g., tax and accounting, the term finance lease has been used to connote different types of lease transactions, including leases that are disguised secured transactions. *M. Rice, Equipment Financing*, 62-71 (1981). A lessor who is a merchant with respect to goods of the kind subject to the lease may be a lessor under a finance lease. Many leases that are leases back to the seller of goods (Section 2A-308(3)) will be finance leases. This conclusion is easily demonstrated by a hypothetical. Assume that B has bought goods from C pursuant to a sales contract. After delivery to and acceptance of the goods by B, B negotiates to sell the goods to A and simultaneously to lease the goods back from A, on terms and conditions that, we assume, will qualify the transaction as a lease. Section 2A-103(1)(j). In documenting the sale and lease back, B assigns the original sales contract between B, as buyer, and C, as seller, to A. A review of these facts leads to the conclusion that the lease from A to B qualifies as a finance lease, as all three conditions of the definition are satisfied. Subparagraph (i) is satisfied as A, the lessor, had nothing to do with the selection, manufacture, or supply of the equipment. Subparagraph (ii) is satisfied as A, the lessor, bought the equipment at the same time that A leased the equipment to B, which certainly is in connection with the lease. Finally, subparagraph (iii) (A) is satisfied as A entered into the sales contract with B at the same time that A leased the equipment back to B. B, the lessee, will have received a copy of the sales contract in a timely fashion.

Subsection (i) requires the lessor to remain outside the selection, manufacture and supply of the goods; that is the rationale for releasing the lessor from most of its traditional liability. The lessor is not prohibited from possession, maintenance or operation of the goods, as policy does not require such prohibition. To insure the lessee's reliance on the supplier, and not on the lessor, subsection (ii) requires that the goods (where the lessor is the buyer of the goods) or that the right to possession and use of the goods (where the lessor is the prime lessee and the sublessor of the goods) be acquired in connection with the lease (or sublease) to qualify as a finance lease. The scope of the phrase "in connection with" is to be developed by the courts, case by case. Finally, as the lessee generally relies almost entirely upon the supplier for representations and covenants, and upon the supplier or a manufacturer, or both, for warranties with respect to the goods, subsection (iii)

requires that one of the following occur: (A) the lessee receive a copy of the supply contract before signing the lease contract; (B) the lessee's approval of the supply contract is a condition to the effectiveness of the lease contract; (C) the lessee receive a statement describing the promises and warranties and any limitations relevant to the lessee before signing the lease contract; or (D) before signing the lease contract and except in a consumer lease, the lessee receive a writing identifying the supplier (unless the supplier was selected and required by the lessee) and the rights of the lessee under Section 2A-209, and advising the lessee a statement of promises and warranties is available from the supplier. Thus, even where oral supply orders or computer placed supply orders are compelled by custom and usage the transaction may still qualify as a finance lease if the lessee approves the supply contract before the lease contract is effective and such approval was a condition to the effectiveness of the lease contract. Moreover, where the lessor does not want the lessee to see the entire supply contract, including price information, the lessee may be provided with a separate statement of the terms of the supply contract relevant to the lessee; promises between the supplier and the lessor that do not affect the lessee need not be included. The statement can be a restatement of those terms or a copy of portions of the supply contract with the relevant terms clearly designated. Any implied warranties need not be designated, but a disclaimer or modification of remedy must be designated. A copy of any manufacturer's warranty is sufficient if that is the warranty provided. However, a copy of any Regulation M disclosure given pursuant to 12 C.F.R. § 213.4(g) concerning warranties in itself is not sufficient since those disclosures need only briefly identify express warranties and need not include any disclaimer of warranty.

If a transaction does not qualify as a finance lease, the parties may achieve the same result by agreement; no negative implications are to be drawn if the transaction does not qualify. Further, absent the application of special rules (fraud, duress, and the like), a lease that qualifies as a finance lease and is assigned by the lessor or the lessee to a third party does not lose its status as a finance lease under this Article. Finally, this Article creates no special rule where the lessor is an affiliate of the supplier; whether the transaction qualifies as a finance lease will be determined by the facts of each case.

(h) "Goods". Section 9-102(a)(44). See Section 2A-103(3) for reference to the definition of "Account", "Chattel paper", "Document", "General intangibles" and "Instrument". See Section 2A-217 for determination of the time and manner of identification.

(i) "Installment lease contract". Section 2-612(1).

(j) "Lease". New. There are several reasons to codify the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least several significant issues to be resolved by codification. First and foremost is the definition of a lease. It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the transaction will be governed by the Article on Secured Transactions (Article 9) and the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases under the common law and, except with respect to leases of fixtures (Section 2A-309), this Article imposes no such requirement. Yet the distinction between a lease and a security interest disguised as a lease is not clear from the case law at the time of the promulgation of this Article. DeKoven, *Leases of Equipment: Puritan Leasing Company v. August, A Dangerous Decision*, 12 U.S.F. L. Rev. 257 (1978).

At common law a lease of personal property is a bailment for hire. While there are several definitions of bailment for hire, all require a thing to be let and a price for the letting. Thus, in modern terms and as provided in this definition, a lease is created when the lessee agrees to furnish consideration for the right to the possession and use of goods over a specified period of time. Mooney, *Personal Property Leasing: A Challenge*, 36 Bus. Law. 1605, 1607 (1981). Further, a lease is neither a sale (Section 2-106(1)) nor a retention or creation of a security interest (Sections 1-201(b)(35) and 1-203). Due to extensive litigation to distinguish true leases from security interests, an amendment to former Section 1-201(37) (now codified as Section 1-203) was promulgated with this Article to create a sharper distinction.

This section as well as Section 1-203 must be examined to determine whether the transaction in question creates a lease or a security interest. The following hypotheticals indicate the perimeters of the issue. Assume that A has purchased a number of copying machines, new, for \$1,000 each; the machines have an estimated useful economic life of three years. A advertises that the machines are available to rent for a minimum of one month and that the monthly rental is \$100.00. A intends to enter into leases where A provides all maintenance, without charge to the lessee. Further, the lessee will rent the machine, month to month, with no obligation to renew. At the end of the lease term the lessee will be obligated to return the machine to A's place of

business. This transaction qualifies as a lease under the first half of the definition, for the transaction includes a transfer by A to a prospective lessee of possession and use of the machine for a stated term, month to month. The machines are goods (Section 2A-103(1)(h)). The lessee is obligated to pay consideration in return, \$100.00 for each month of the term.

However, the second half of the definition provides that a sale or a security interest is not a lease. Since there is no passing of title, there is no sale. Sections 2A-103(3) and 2-106(1). Under pre-Act security law this transaction would have created a bailment for hire or a true lease and not a conditional sale. *Da Rocha v. Macomber*, 330 Mass. 611, 614-15, 116 N.E.2d 139, 142 (1953). Under Section 1-203, the same result would follow. While the lessee is obligated to pay rent for the one-month term of the lease, one of the other four conditions of Section 1-203(b) must be met and none is. The term of the lease is one month and the economic life of the machine is 36 months; thus, Section 1-203(b)(1) is not now satisfied. Considering the amount of the monthly rent, absent economic duress or coercion, the lessee is not bound either to renew the lease for the remaining economic life of the goods or to become the owner. If the lessee did lease the machine for 36 months, the lessee would have paid the lessor \$3,600 for a machine that could have been purchased for \$1,000; thus, Section 1-203(b)(2) is not satisfied. Finally, there are no options; thus, subparagraphs (3) and (4) of Section 1-203(b) are not satisfied. This transaction creates a lease, not a security interest. However, with each renewal of the lease the facts and circumstances at the time of each renewal must be examined to determine if that conclusion remains accurate, as it is possible that a transaction that first creates a lease, later creates a security interest.

Assume that the facts are changed and that A requires each lessee to lease the goods for 36 months, with no right to terminate. Under pre-Act security law this transaction would have created a conditional sale, and not a bailment for hire or true lease. *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664, 672-73 (1876). Under this subsection, and Section 1-203, the same result would follow. The lessee's obligation for the term is not subject to termination by the lessee and the term is equal to the economic life of the machine.

Between these extremes there are many transactions that can be created. Some of the transactions were not properly categorized by the courts in applying the 1978 and earlier Official Texts of former Section 1-201(37). This subsection, together with Section 1-203, draws a brighter line, which should create a

clearer signal to the professional lessor and lessee.

(k) "Lease agreement". This definition is derived from Section 1-201(b)(3). Because the definition of lease is broad enough to cover future transfers, lease agreement includes an agreement contemplating a current or subsequent transfer. Thus it was not necessary to make an express reference to an agreement for the future lease of goods (Section 2-106(1)). This concept is also incorporated in the definition of lease contract. Note that the definition of lease does not include transactions in ordinary building materials that are incorporated into an improvement on land. Section 2A-309(2).

The provisions of this Article, if applicable, determine whether a lease agreement has legal consequences; otherwise the law of bailments and other applicable law determine the same. Sections 2A-103(4) and 1-103.

(l) "Lease contract". This definition is derived from the definition of contract in Section 1-201(b)(12). Note that a lease contract may be for the future lease of goods, since this notion is included in the definition of lease.

(m) "Leasehold interest". New.

(n) "Lessee". New.

(o) "Lessee in ordinary course of business". Section 1-201(b)(9).

(p) "Lessor". New.

(q) "Lessor's residual interest". New.

(r) "Lien". New. This term is used in Section 2A-307 (Priority of Liens Arising by Attachment or Levy on, Security Interests in, and Other Claims to Goods).

(s) "Lot". Section 2-105(5).

(t) "Merchant lessee". New. This term is used in Section 2A-511 (Merchant Lessee's Duties as to Rightfully Rejected Goods). A person may satisfy the requirement of dealing in goods of the kind subject to the lease as lessor, lessee, seller, or buyer.

(u) [Deleted.]

(v) "Purchase". Section 1-201(b)(29). This definition omits the reference to lien contained in the definition of purchase in Article 1 (Section 1-201(b)(29)). This should not be construed to exclude consensual liens from the definition of purchase in this Article; the exclusion was mandated by the scope of the definition of lien in Section 2A-103(1)(r). Further, the definition of purchaser in this Article adds a reference to lease; as purchase is defined in Section 1-201(b)(29) to include any other voluntary transaction creating an interest in property, this addition is not substantive.

(w) "Sublease". New.

(x) "Supplier". New.

(y) "Supply contract". New.

(z) "Termination". Section 2-106(3). The effect of a termination is provided in Section 2A-505(2).

28-12-104. Leases subject to other law. — (1) A lease, although subject to this chapter, is also subject to any applicable:

(a) Certificate of title statute of this state; or

(b) Certificate of title statute of another jurisdiction (section 28-12-105[, Idaho Code]); or

(c) Provision of the Idaho credit code.

(2) In case of conflict between this chapter, other than sections 28-12-105, 28-12-304(3), and 28-12-305(3)[, Idaho Code], and a statute or decision referred to in subsection (1) of this section, the statute controls.

(3) Failure to comply with an applicable law has only the effect specified therein.

History.

I.C., § 28-12-104, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in paragraphs (1)(b) and subsection (2) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 9-203(4) and 9-302(3)(b) and (c).

Changes: Substantially revised.

Purposes: 1. This Article creates a comprehensive scheme for the regulation of transactions that create leases. Section 2A-102. Thus, the Article supersedes all prior legislation dealing with leases, except to the extent set forth in this Section.

2. Subsection (1) states the general rule that a lease, although governed by the scheme of this Article, also may be governed by certain other applicable laws. This may occur in the case of a consumer lease. Section 2A-103(1)(e). Those laws may be state statutes existing prior to enactment of Article 2A or passed afterward. In this case, it is desirable for this Article to specify which statute controls. Or the law may be a pre-existing consumer protection decision. This Article preserves such decisions. Or the law may be a statute of the United States. Such a law controls without any statement in this Article under applicable principles of preemption.

An illustration of a statute of the United States that governs consumer leases is the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667(e) (1982) and its implementing regulation, Regulation M, 12 C.F.R. § 213 (1986); the statute mandates disclosures of certain lease terms, delimits the liability of a lessee in leasing personal property, and regulates the advertising of lease terms. An illustration of a state statute that governs consumer leases and which if adopted in the enacting state prevails over this Article is the Unif. Consumer Credit Code, which includes many provisions similar to those of the Consumer Leasing Act, e.g. Unif. Consumer Credit Code §§ 3.202, 3.209, 3.401, 7A U.L.A. 108-09, 115, 125 (1974), as well as provisions in addition to those of the Consumer Leasing Act, e.g., Unif. Consumer Credit Code §§ 5.109-111, 7A U.L.A. 171-76 (1974) (the right to cure a default). Such statutes may define consumer

lease so as to govern transactions within and without the definition of consumer lease under this Article.

3. Under subsection (2), subject to certain limited exclusions, in case of conflict a statute or a decision described in subsection (1) prevails over this Article. For example, a provision like Unif. Consumer Credit Code § 5.112, 7A U.L.A. 176 (1974), limiting self-help repossession, prevails over Section 2A-525(3). A consumer protection decision rendered after the effective date of this Article may supplement its provisions. For example, in relation to Article 9 a court might conclude that an acceleration clause may not be enforced against an individual debtor after late payments have been accepted unless a prior notice of default is given. To the extent the decision establishes a general principle applicable to transactions other than secured transactions, it may supplement Section 2A-502.

4. Consumer protection in lease transactions is primarily left to other law. However, several provisions of this Article do contain special rules that may not be varied by agreement in the case of a consumer lease. E.g., Sections 2A-106, 2A-108, and 2A-109(2). Were that not so, the ability of the parties to govern their relationship by agreement together with the position of the lessor in a consumer lease too often could result in a one-sided lease agreement.

5. In construing this provision the reference to statute should be deemed to include applicable regulations. A consumer protection decision is "final" on the effective date of this Article if it is not subject to appeal on that date or, if subject to appeal, is not later reversed on appeal. Of course, such a decision can be overruled by a later decision or superseded by a later statute.

Cross References: Sections 2A-103(1)(e), 2A-106, 2A-108, 2A-109(2) and 2A-525(3).

Definitional Cross Reference: "Lease". Section 2A-103(1)(j).

28-12-105. Territorial application of article to goods covered by certificate of title. — Subject to the provisions of sections 28-12-304(3) and 28-12-305(3)[, Idaho Code], with respect to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of:

(1) Surrender of the certificate; or

(2) Four (4) months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

History.

I.C., § 28-12-105, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertion in the introductory paragraph was added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-103(2)(a) and (b).

Changes: Substantially revised. The provisions of the last sentence of Section 9-103(2)(b) have not been incorporated as it is superfluous in this context. The provisions of Section 9-103(2)(d) have not been incorporated because the problems dealt with are adequately addressed by this section and Sections 2A-304(3) and 305(3).

Purposes: The new certificate referred to in (b) must be permanent, not temporary. Generally, the lessor or creditor whose inter-

est is indicated on the most recently issued certificate of title will prevail over interests indicated on certificates issued previously by other jurisdictions. This provision reflects a policy that it is reasonable to require holders of interests in goods covered by a certificate of title to police the goods or risk losing their interests when a new certificate of title is issued by another jurisdiction.

Cross References: Sections 2A-304(3), 2A-305(3), 9-103(2)(b) and 9-103(2)(d).

Definitional Cross Reference: "Goods". Section 2A-103(1)(h).

28-12-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum. — (1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within thirty (30) days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

History.

I.C., § 28-12-106, as added by 1993, ch. 287, § 1, p. 977.

JUDICIAL DECISIONS**Applicable law.**

In a dispute over whether a vehicle transaction was a true lease or disguised security interest, Idaho law applied because, if it was under a security agreement, certificate of title of the vehicle was issued in Idaho, and, if it

was a true lease, because the debtors resided in Idaho at the time the agreement became enforceable, the agreement's choice of law provision would have been unenforceable and Idaho law would not apply. In re Bumgardner, 183 Bankr. 224 (Bankr. D. Idaho 1995).

OFFICIAL COMMENT

Uniform Statutory Source: Unif. Consumer Credit Code § 1.201(8), 7A U.L.A. 36 (1974).

Changes: Substantially revised.

Purposes: There is a real danger that a lessor may induce a consumer lessee to agree

that the applicable law will be a jurisdiction that has little effective consumer protection, or to agree that the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation. As a result, this section invalidates these choice of law or forum

clauses, except where the law chosen is that of the state of the consumer's residence or where the goods will be kept, or the forum chosen is one that otherwise would have jurisdiction over the lessee.

Subsection (1) limits potentially abusive choice of law clauses in consumer leases. The 30-day rule in subsection (1) was suggested by Section 9-103(1)(c). This section has no effect on choice of law clauses in leases that are not consumer leases. Such clauses would be governed by other law.

Subsection (2) prevents enforcement of potentially abusive jurisdictional consent clauses in consumer leases. By using the term judicial forum, this section does not limit

selection of a nonjudicial forum, such as arbitration. This section has no effect on choice of forum clauses in leases that are not consumer leases; such clauses are, as a matter of current law, "prima facie valid". The *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Such clauses would be governed by other law, including the Model Choice of Forum Act (1968).

Cross Reference: Section 9-103(1)(c).

Definitional Cross References: "Consumer lease". Section 2A-103(1)(e).

"Lease agreement". Section 2A-103(1)(k).

"Lessee". Section 2A-103(1)(n).

"Goods". Section 2A-103(1)(h).

"Party". Section 1-201(29).

28-12-107. Waiver or renunciation of claim or right after default.

— Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

History.

I.C., § 28-12-107, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 1-107.

Changes: Revised to reflect leasing practices and terminology. This clause is used throughout the official comments to this Article to indicate the scope of change in the provisions of the Uniform Statutory Source included in the section; these changes range from one extreme, e.g., a significant difference in practice (a warranty as to merchantability is not implied in a finance lease (Section 2A-212)) to the other extreme, e.g., a modest

difference in style or terminology (the transaction governed is a lease not a sale (Section 2A-103)).

Cross References: Sections 2A-103 and 2A-212.

Definitional Cross References: "Aggrieved party". Section 1-201(2).

"Delivery". Section 1-201(14).

"Rights". Section 1-201(36).

"Signed". Section 1-201(39).

"Written". Section 1-201(46).

28-12-108. Unconscionability. — (1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract, or any clause of a lease contract, has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2) of this section, the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2) of this section, the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) of this section is not controlling.

History.

I.C., § 28-12-108, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-302 and Unif. Consumer Credit Code § 5.108, 7A U.L.A. 167-69 (1974).

Changes: Subsection (1) is taken almost verbatim from the provisions of Section 2-302(1). Subsection (2) is suggested by the provisions of Unif. Consumer Credit Code § 5.108(1), (2), 7A U.L.A. 167 (1974). Subsection (3), taken from the provisions of Section 2-302(2), has been expanded to cover unconscionable conduct. Unif. Consumer Credit Code § 5.108(3), 7A U.L.A. 167 (1974). The provision for the award of attorney's fees to consumers, subsection (4), covers unconscionability under subsection (1) as well as (2). Subsection (4) is modeled on the provisions of Unif. Consumer Credit Code § 5.108(6), 7A U.L.A. 169 (1974).

Purposes: Subsections (1) and (3) of this section apply the concept of unconscionability reflected in the provisions of Section 2-302 to leases. See *Dillman & Assocs. v. Capitol Leasing Co.*, 110 Ill. App. 3d 335, 342, 442 N.E.2d 311, 316 (App. Ct. 1982). Subsection (3) omits the adjective "commercial" found in subsection 2-302(2) because subsection (3) is concerned with all leases and the relevant standard of conduct is determined by the context.

The balance of the section is modeled on the provisions of Unif. Consumer Credit Code § 5.108, 7A U.L.A. 167-69 (1974). Thus subsection (2) recognizes that a consumer lease or a clause in a consumer lease may not itself be unconscionable but that the agreement would never have been entered into if unconscionable means had not been employed to induce the consumer to agree. To make a

statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement's admissibility in a subsequent dispute, may be unconscionable. Subsection (2) also provides a consumer remedy for unconscionable conduct, such as using or threatening to use force or violence, in the collection of a claim arising from a lease contract. These provisions are not exclusive. The remedies of this section are in addition to remedies otherwise available for the same conduct under other law, for example, an action in tort for abusive debt collection or under another statute of this State for such conduct. The reference to appropriate relief in subsection (2) is intended to foster liberal administration of this remedy. Sections 2A-103(4) and 1-106(1).

Subsection (4) authorizes an award of reasonable attorney's fees if the court finds unconscionability with respect to a consumer lease under subsection (1) or (2). Provision is also made for recovery by the party against whom the claim was made if the court does not find unconscionability and does find that the consumer knew the action to be groundless. Further, subsection (4)(b) is independent of, and thus will not override, a term in the lease agreement that provides for the payment of attorney's fees.

Cross References: Sections 1-106(1), 2-302 and 2A-103(4).

Definitional Cross References: "Action". Section 1-201(1).

"Consumer lease". Section 2A-103(1)(e).

"Lease contract". Section 2A-103(1)(f).

"Lessee". Section 2A-103(1)(n).

"Party". Section 1-201(29).

28-12-109. Option to accelerate at will. — (1) A term providing that one (1) party or his successor in interest may accelerate payment or

performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import must be construed to mean that he has power to do so only if he in good faith believes that the prospect of payment or performance is impaired.

(2) With respect to a consumer lease, the burden of establishing good faith under subsection (1) of this section is on the party who exercised the power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

History.

I.C., § 28-12-109, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 1-208 and Unif. Consumer Credit Code § 5.109(2), 7A U.L.A. 171 (1974).

Purposes: Subsection (1) reflects modest changes in style to the provisions of the first sentence of Section 1-208.

Subsection (2), however, reflects a significant change in the provisions of the second sentence of Section 1-208 by creating a new rule with respect to a consumer lease. A lease provision allowing acceleration at the will of the lessor or when the lessor deems itself insecure is of critical importance to the lessee. In a consumer lease it is a provision that is not usually agreed to by the parties but is usually mandated by the lessor. Therefore,

where its invocation depends not on specific criteria but on the discretion of the lessor, its use should be regulated to prevent abuse. Subsection (1) imposes a duty of good faith upon its exercise. Subsection (2) shifts the burden of establishing good faith to the lessor in the case of a consumer lease, but not otherwise.

Cross Reference: Section 1-208.

Definitional Cross References: “Burden of establishing”. Section 1-201(8).

“Consumer lease”. Section 2A-103(1)(e).

“Good faith”. Sections 1-201(19) and 2-103(1)(b).

“Party”. Section 1-201(29).

“Term”. Section 1-201(42).

PART 2. FORMATION AND CONSTRUCTION OF LEASE CONTRACT

28-12-201. Statute of frauds. — (1) A lease contract is not enforceable by way of action or defense unless:

(a) The total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than one thousand dollars (\$1,000); or

(b) There is a writing, signed by the party against whom enforcement is sought or by that party’s authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

(2) Any description of leased goods or of the lease term is sufficient and satisfies the provisions of subsection (1)(b) of this section, whether or not it is specific, if it reasonably identifies what is described.

(3) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under the provisions of subsection (1)(b) of this section beyond the lease term and the quantity of goods shown in the writing.

(4) A lease contract that does not satisfy the requirements of subsection (1) of this section, but which is valid in other respects, is enforceable:

(a) If the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the

lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) With respect to goods that have been received and accepted by the lessee.

(5) The lease term under a lease contract referred to in subsection (4) of this section is:

(a) If there is a writing signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court a lease term, the term so admitted; or

(c) A reasonable lease term.

History.

I.C., § 28-12-201, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-201, 9-203(1) and 9-110.

Changes: This section is modeled on Section 2-201, with changes to reflect the differences between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds a requirement that the writing "describe the goods leased and the lease term", borrowing that concept, with revisions, from the provisions of Section 9-203(1)(a). Subsection (2), relying on the statutory analogue in Section 9-110, sets forth the minimum criterion for satisfying that requirement.

Purposes: The changes in this section conform the provisions of Section 2-201 to custom and usage in lease transactions. Section 2-201(2), stating a special rule between merchants, was not included in this section as the number of such transactions involving leases, as opposed to sales, was thought to be modest. Subsection (4) creates no exception for transactions where payment has been made and accepted. This represents a departure from the analogue, Section 2-201(3)(c). The rationale for the departure is grounded in the distinction between sales and leases. Unlike a

buyer in a sales transaction, the lessee does not tender payment in full for goods delivered, but only payment of rent for one or more months. It was decided that, as a matter of policy, this act of payment is not a sufficient substitute for the required memorandum. Subsection (5) was needed to establish the criteria for supplying the lease term if it is omitted, as the lease contract may still be enforceable under subsection (4).

Cross References: Sections 2-201, 9-110 and 9-203(1)(a).

Definitional Cross References: "Action". Section 1-201(1).

"Agreed". Section 1-201(3).

"Buying". Section 2A-103(1)(a).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

"Sale". Section 2-106(1).

"Signed". Section 1-201(39).

"Term". Section 1-201(42).

"Writing". Section 1-201(46).

28-12-202. Final written expression — Parol or extrinsic evidence. — Terms with respect to which the confirmatory memoranda of the

parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

- (a) By course of dealing or usage of trade or by course of performance; and
- (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

History.

I.C., § 28-12-202, as added by 1993, ch. 287, § 1, p. 977.

JUDICIAL DECISIONS

Common Law Rule Superseded.

Parties and the trial court incorrectly applied common law parol evidence principles, rather than the provisions of this section, in

an action or a contract, such as a motor vehicle lease. *Posey v. Ford Motor Credit Co.*, 141 Idaho 477, 111 P.3d 162 (Ct. App. 2005).

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-202.

Definitional Cross References: "Agreement". Section 1-201(3).
 "Course of dealing". Section 1-205 [1-303].

"Party". Section 1-201(29).

"Term". Section 1-201(42).

"Usage of trade". Section 1-205 [1-303].

"Writing". Section 1-201(46).

28-12-203. Seals inoperative. — The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

History.

I.C., § 28-12-203, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-203.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Lease contract". Section 2A-103(1)(l).

"Writing". Section 1-201(46).

28-12-204. Formation in general. — (1) A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.

(2) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

(3) Although one (1) or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy.

History.

I.C., § 28-12-204, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-204.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Agreement". Section 1-201(3).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Remedy". Section 1-201(34).

"Term". Section 1-201(42).

28-12-205. Firm offers. — An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed three (3) months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

History.

I.C., § 28-12-205, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-205.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Merchant". Section 2-104 [1-205] (1).

"Person". Section 1-201(30).

"Reasonable time". Section 1-204(1) and (2).

"Signed". Section 1-201(39).

"Term". Section 1-201(42).

"Writing". Section 1-201(46).

28-12-206. Offer and acceptance in formation of lease contract. —
(1) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

(2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

History.

I.C., § 28-12-206, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-206(1)(a) and (2).

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Lease contract". Section 2A-103(1)(l).

"Notifies". Section 1-201(26).

"Reasonable time". Section 1-204 [1-205] (1) and (2).

28-12-207. Course of performance or practical construction. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 28-12-207, as added by 1993, ch. 287, § 1, p. 977, was repealed by S.L. 2004, ch. 43, § 37.

28-12-208. Modification, rescission and waiver. — (1) An agreement modifying a lease contract needs no consideration to be binding.

(2) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

(3) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) of this section, it may operate as a waiver.

(4) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

History.

I.C., § 28-12-208, as added by 1993, ch. 287, § 1, p. 977.

JUDICIAL DECISIONS

Common Law Rule Superseded.

Common law rule requiring consideration for contract modification, like the common law parol evidence rule, was superseded by the Uniform Commercial Code, and this sec-

tion provides that an agreement modifying a lease contract needs no consideration to be binding. *Posey v. Ford Motor Credit Co.*, 141 Idaho 477, 111 P.3d 162 (Ct. App. 2005).

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-209.

Changes: Revised to reflect leasing practices and terminology, except that the provisions of subsection 2-209(3) were omitted.

Purposes: Section 2-209(3) provides that "the requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions." This provision was not incorporated as it is unfair to allow an oral modification to make the entire lease contract unenforceable, e.g., if the modification takes it a few dollars over the dollar limit. At the same time, the problem could not be solved by providing that the lease contract would still be enforceable in its pre-modification state (if it then satisfied the statute of frauds) since in

some cases that might be worse than no enforcement at all. Resolution of the issue is left to the courts based on the facts of each case.

Cross References: Sections 2-201 and 2-209.

Definitional Cross References: "Agreement". Section 1-201(3).

"Between merchants". Section 2-104(3).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Merchant". Section 2-104(1).

"Notification". Section 1-201(26).

"Party". Section 1-201(29).

"Signed". Section 1-201(39).

"Term". Section 1-201(42).

"Writing". Section 1-201(46).

28-12-209. Lessee under finance lease as beneficiary of supply contract. — (1) The benefit of a supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

(2) The extension of the benefit of a supplier's promises and of warranties to the lessee under subsection (1) of this section, does not:

(a) Modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise; or

(b) Impose any duty or liability under the supply contract on the lessee.

(3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, prior to before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.

(4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (1) of this section, the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

History.

I.C., § 28-12-209, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Changes: This section is modeled on Section 9-318, the Restatement (Second) of Contracts §§ 302-315 (1981), and leasing practices. See *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291, 1296-97 (5th Cir. 1980).

Purposes: 1. The function performed by the lessor in a finance lease is extremely limited. Section 2A-103(1)(g). The lessee looks to the supplier of the goods for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. That expectation is reflected in subsection (1), which is self-executing. As a matter of policy, the operation of this provision may not be excluded, modified or limited; however, an exclusion, modification, or limitation of any term of the supply contract or warranty, including any with respect to rights and remedies, and any defense or claim such as a statute of limitations, effective against the lessor as the acquiring party

under the supply contract, is also effective against the lessee as the beneficiary designated under this provision. For example, the supplier is not precluded from excluding or modifying an express or implied warranty under a supply contract. Sections 2-312(2) and 2-316, or Section 2A-214. Further, the supplier is not precluded from limiting the rights and remedies of the lessor and from liquidating damages. Sections 2-718 and 2-719 or Sections 2A-503 and 2A-504. If the supply contract excludes or modifies warranties, limits remedies, or liquidates damages with respect to the lessor, such provisions are enforceable against the lessee as beneficiary. Thus, only selective discrimination against the beneficiaries designated under this section is precluded, i.e., exclusion of the supplier's liability to the lessee with respect to warranties made to the lessor. This section does not affect the development of other law with respect to products liability.

2. Enforcement of this benefit is by action. Sections 2A-103(4) and 1-106(2).

3. The benefit extended by these provisions is not without a price, as this Article also provides in the case of a finance lease that is not a consumer lease that the lessee's promises to the lessor under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods. Section 2A-407.

4. Subsection (2) limits the effect of subsection (1) on the supplier and the lessor by preserving, notwithstanding the transfer of the benefits of the supply contract to the lessee, all of the supplier's and the lessor's rights and obligations with respect to each other and others; it further absolves the lessee of any duties with respect to the supply contract that might have been inferred from the extension of the benefits thereof.

5. Subsections (2) and (3) also deal with difficult issues related to modification or rescission of the supply contract. Subsection (2) states a rule that determines the impact of the statutory extension of benefit contained in subsection (1) upon the relationship of the parties to the supply contract and, in a limited respect, upon the lessee. This statutory extension of benefit, like that contained in Sections 2A-216 and 2-318, is not a modification of the supply contract by the parties. Thus, subsection (3) states the rules that apply to a modification or rescission of the supply contract by the parties. Subsection (3) provides that a modification or rescission is not effective between the supplier and the lessee if, before the modification or rescission

occurs, the supplier received notice that the lessee has entered into the finance lease. On the other hand, if the modification or rescission is effective, then to the extent of the modification or rescission of the benefit or warranty, the lessor by statutory dictate assumes an obligation to provide to the lessee that which the lessee would otherwise lose. For example, assume a reduction in an express warranty from four years to one year. No prejudice to the lessee may occur if the goods perform as agreed. If, however, there is a breach of the express warranty after one year and before four years pass, the lessor is liable. A remedy for any prejudice to the lessee because of the bifurcation of the lessee's recourse resulting from the action of the supplier and the lessor is left to resolution by the courts based on the facts of each case.

6. Subsection (4) makes it clear that the rights granted to the lessee by this section do not displace any rights the lessee otherwise may have against the supplier.

Cross References: Sections 2A-103(1)(g), 2A-407 and 9-318.

Definitional Cross References: "Action". Section 1-201(1).

"Finance lease". Section 2A-103(1)(g).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x).

"Supply contract". Section 2A-103(1)(y).

"Term". Section 1-201(42).

28-12-210. Express warranties. — (1) Express warranties by the lessor are created as follows:

(a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

(c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

History.

I.C., § 28-12-210, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-313.

Changes: Revised to reflect leasing practices and terminology.

Purposes: All of the express and implied warranties of the Article on Sales (Article 2) are included in this Article, revised to reflect the differences between a sale of goods and a lease of goods. Sections 2A-210 through 2A-216. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Hawkland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 Ill.

L.F. 446, 459-60. Many state and federal courts have reached the same conclusion.

Value of the goods, as used in subsection (2), includes rental value.

Cross References: Article 2, esp. Section 2-313, and Sections 2A-210 through 2A-216.

Definitional Cross References: "Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Value". Section 1-201(44) [now 1-204].

28-12-211. Warranties against interference and against infringement — Lessee's obligation against infringement. — (1) There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.

(2) Except in a finance lease there is, in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind, a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

(3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

History.

I.C., § 28-12-211, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-312.

Changes: This section is modeled on the provisions of Section 2-312, with modifications to reflect the limited interest transferred by a lease contract and the total interest transferred by a sale. Section 2-312(2), which is omitted here, is incorporated in Section 2A-214. The warranty of quiet possession was abolished with respect to sales of goods. Section 2-312 official comment 1. Section 2A-211(1) reinstates the warranty of quiet possession with respect to leases. Inherent in the nature of the limited interest transferred by the lease — the right to possession and use of the goods — is the need of the lessee for protection greater than that afforded to the

buyer. Since the scope of the protection is limited to claims or interests that arose from acts or omissions of the lessor, the lessor will be in position to evaluate the potential cost, certainly a far better position than that enjoyed by the lessee. Further, to the extent the market will allow, the lessor can attempt to pass on the anticipated additional cost to the lessee in the guise of higher rent.

Purposes: General language was chosen for subsection (1) that expresses the essence of the lessee's expectation: with an exception for infringement and the like, no person holding a claim or interest that arose from an act or omission of the lessor will be able to interfere with the lessee's use and enjoyment of the goods for the lease term. Subsection (2), like

other similar provisions in later sections, excludes the finance lessor from extending this warranty; with few exceptions (Sections 2A-210 and 2A-211(1)), the lessee under a finance lease is to look to the supplier for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. Subsections (2) and (3) are derived from Section 2-312(3). These subsections, as well as the analogue, should be construed so that applicable principles of law and equity supplement their provisions. Sections 2A-103(4) and 1-103.

Cross References: Sections 2-312,

2-312(1), 2-312(2), 2-312 official comment 1, 2A-210, 2A-211(1) and 2A-214.

Definitional Cross References: "Delivery". Section 1-201(14).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Person". Section 1-201(30).

"Supplier". Section 2A-103(1)(x).

28-12-212. Implied warranty of merchantability. — (1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the description in the lease agreement;

(b) In the case of fungible goods, are of fair average quality within the description;

(c) Are fit for the ordinary purposes for which goods of that type are used;

(d) Run, within the variation permitted by the lease agreement, of even kind, quality and quantity within each unit and among all units involved;

(e) Are adequately contained, packaged and labeled as the lease agreement may require; and

(f) Conform to any promises or affirmations of fact made on the container or label.

(3) Other implied warranties may arise from course of dealing or usage of trade.

History.

I.C., § 28-12-212, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-314.

Changes: Revised to reflect leasing practices and terminology. E.g., *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 225, 541 P.2d 1184, 1193 (1975) (implied warranty of merchantability (Article 2) extends to lease transactions).

Definitional Cross References: "Conforming". Section 2A-103(1)(d).

"Course of dealing". Section 1-205 [1-303].

"Finance lease". Section 2A-103(1)(g).

"Fungible". Section 1-201(17).

"Goods". Section 2A-103(1)(h).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Usage of trade". Section 1-205 [1-303].

28-12-213. Implied warranty of fitness for particular purpose. — Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to

select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

History.

I.C., § 28-12-213, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-315.

Changes: Revised to reflect leasing practices and terminology. E.g., *All-States Leasing Co. v. Bass*, 96 Idaho 873, 879, 538 P.2d 1177, 1183 (1975) (implied warranty of fitness for a particular purpose (Article 2) extends to lease transactions).

Definitional Cross References: "Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Knows". Section 1-201(25).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

28-12-214. Exclusion or modification of warranties. — (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of section 28-12-202[, Idaho Code,] on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

(2) Subject to the provisions of subsection (3) of this section, to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability", be by a writing, and be conspicuous. Subject to the provisions of subsection (3) of this section, to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose".

(3) Notwithstanding the provisions of subsection (2) of this section, but subject to the provisions of subsection (4) of this section:

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults," or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous;

(b) If the lessee, before entering into the lease contract, has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed; and

(c) An implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade.

(4) To exclude or modify a warranty against interference or against infringement (section 28-12-211[, Idaho Code]) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person.

History.

I.C., § 28-12-214, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions in subsections (1) and (4) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

Cited in: In re *Zaleha*, 159 Bankr. 581 (Bankr. D. Idaho 1993).

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-316 and 2-312(2).

Changes: Subsection (2) requires that a disclaimer of the warranty of merchantability be conspicuous and in writing as is the case for a disclaimer of the warranty of fitness; this is contrary to the rule stated in Section 2-316(2) with respect to the disclaimer of the warranty of merchantability. This section also provides that to exclude or modify the implied warranty of merchantability, fitness or against interference or infringement the language must be in writing and conspicuous. There are, however, exceptions to the rule. E.g., course of dealing, course of performance, or usage of trade may exclude or modify an implied warranty. Section 2A-214(3)(c). The analogue of Section 2-312(2) has been moved to subsection (4) of this section for a more unified treatment of disclaimers; there is no policy with respect to leases of goods that would justify continuing certain distinctions found in the Article on Sales (Article 2) regarding the treatment of the disclaimer of various warranties. Compare Sections 2-312(2) and 2-316(2). Finally, the example of a disclaimer of the implied warranty of fitness

stated in subsection (2) differs from the analogue stated in Section 2-316(2); this example should promote a better understanding of the effect of the disclaimer.

Purposes: These changes were made to reflect leasing practices. E.g., *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 418 (5th Cir. 1980) (disclaimer of implied warranty under lease transactions must be conspicuous and in writing). The omission of the provisions of Section 2-316(4) was not substantive. Sections 2A-503 and 2A-504.

Cross References: Article 2, esp. Sections 2-312(2) and 2-316, and Sections 2A-503 and 2A-504.

Definitional Cross References: "Conspicuous". Section 1-201(10).

"Course of dealing". Section 1-205 [1-303].

"Fault". Section 2A-103(1)(f).

"Goods". Section 2A-103(1)(h).

"Knows". Section 1-201(25).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Person". Section 1-201(30).

"Usage of trade". Section 1-205 [1-303].

"Writing". Section 1-201(46).

28-12-215. Cumulation and conflict of warranties express or implied. — Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention the following rules apply:

(1) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(2) A sample from an existing bulk displaces inconsistent general language of description.

(3) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

History.

I.C., § 28-12-215, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-317.

Definitional Cross Reference: "Party". Section 1-201(29).

28-12-216. Third-party beneficiaries of express and implied warranties. — A warranty to or for the benefit of a lessee under this chapter, whether express or implied, extends to any natural person who is in the family or household of the lessee or who is a guest in the lessee's home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. This section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons. The operation of this section may not be excluded, modified or limited, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against any beneficiary designated under this section.

History.

I.C., § 28-12-216, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-318.

Changes: The provisions of Section 2-318 have been included in this section, modified in two respects: first, to reflect leasing practice, including the special practices of the lessor under a finance lease; second, to reflect and thus codify elements of the official comment to Section 2-318 with respect to the effect of disclaimers and limitations of remedies against third parties.

Purposes: Alternative A [adopted in Idaho] is based on the 1962 version of Section 2-318 and is least favorable to the injured person as the doctrine of privity imposed by other law is abrogated to only a limited extent. Alternatives B and C are based on later additions to Section 2-318 and are more favorable to the injured person. In determining which alternative to select, the state legislature should consider making its choice parallel to the choice it made with respect to Section 2-318, as interpreted by the courts.

The last sentence of each of Alternatives A, B and C does not preclude the lessor from excluding or modifying an express or implied warranty under a lease. Section 2A-214. Further, that sentence does not preclude the lessor from limiting the rights and remedies of the lessee and from liquidating damages.

Sections 2A-503 and 2A-504. If the lease excludes or modifies warranties, limits remedies for breach, or liquidates damages with respect to the lessee, such provisions are enforceable against the beneficiaries designated under this section. However, this last sentence forbids selective discrimination against the beneficiaries designated under this section, i.e., exclusion of the lessor's liability to the beneficiaries with respect to warranties made by the lessor to the lessee.

Other law, including the Article on Sales (Article 2), may apply in determining the extent to which a warranty to or for the benefit of the lessor extends to the lessee and third parties. This is in part a function of whether the lessor has bought or leased the goods.

This Article does not purport to change the development of the relationship of the common law, with respect to products liability, including strict liability in tort (as restated in Restatement (Second) of Torts, § 402A (1965)), to the provisions of this Act. Compare *Cline v. Prowler Indus. of Maryland*, 418 A.2d 968 (Del. 1980) and *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973) with *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967).

Cross References: Article 2, esp. Section

2-318, and Sections 2A-214, 2A-503 and 2A-504.

Definitional Cross References: "Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Person". Section 1-201(30).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

28-12-217. Identification. — Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

(1) When the lease contract is made, if the lease contract is for a lease of goods that are existing and identified;

(2) When the goods are shipped, marked or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or

(3) When the young are conceived, if the lease contract is for a lease of unborn young of animals.

History.

I.C., § 28-12-217, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-501.

Changes: This section, together with Section 2A-218, is derived from the provisions of Section 2-501, with changes to reflect lease terminology; however, this section omits as irrelevant to leasing practice the treatment of special property.

Purposes: With respect to subsection (b) there is a certain amount of ambiguity in the reference to when goods are designated, e.g., when the lessor is both selling and leasing goods to the same lessee/buyer and has marked goods for delivery but has not distin-

guished between those related to the lease contract and those related to the sales contract. As in Section 2-501(1)(b), this issue has been left to be resolved by the courts, case by case.

Cross References: Sections 2-501 and 2A-218.

Definitional Cross References: "Agreement". Section 1-201(3).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

28-12-218. Insurance and proceeds. — (1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.

(2) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.

(3) Notwithstanding a lessee's insurable interest under the provisions of subsections (1) and (2) of this section, the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.

(4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(5) The parties by agreement may determine that one (1) or more parties

have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

History.

I.C., § 28-12-218, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-501.

Changes: This section, together with Section 2A-217, is derived from the provisions of Section 2-501, with changes and additions to reflect leasing practices and terminology.

Purposes: Subsection (2) states a rule allowing substitution of goods by the lessor under certain circumstances, until default or insolvency of the lessor, or until notification to the lessee that identification is final. Subsection (3) states a rule regarding the lessor's insurable interest that, by virtue of the difference between a sale and a lease, necessarily is different from the rule stated in Section 2-501(2) regarding the seller's insurable interest. For this purpose the option to buy shall be deemed to have been exercised by the lessee when the resulting sale is closed, not

when the lessee gives notice to the lessor. Further, subsection (5) is new and reflects the common practice of shifting the responsibility and cost of insuring the goods between the parties to the lease transaction.

Cross References: Sections 2-501, 2-501(2) and 2A-217.

Definitional Cross References: "Agreement". Section 1-201(3).

"Buying". Section 2A-103(1)(a).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Insolvent". Section 1-201(23).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notification". Section 1-201(26).

"Party". Section 1-201(29).

28-12-219. Risk of loss. — (1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(2) Subject to the provisions of this chapter on the effect of default on risk of loss (section 28-12-220[, Idaho Code]), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(a) If the lease contract requires or authorizes the goods to be shipped by carrier:

(i) And it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

(ii) If it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.

(c) In any case not within the provisions of subparagraph (a) or (b) of this subsection, the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

History.

I.C., § 28-12-219, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in the introductory paragraph in subsection (2) was added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-509(1) through (3).

Changes: Subsection (1) is new. The introduction to subsection (2) is new, but subparagraph (a) incorporates the provisions of Section 2-509(1); subparagraph (b) incorporates the provisions of Section 2-509(2) only in part, reflecting current practice in lease transactions.

Purposes: Subsection (1) states rules related to retention or passage of risk of loss consistent with current practice in lease transactions. The provisions of subsection (4) of Section 2-509 are not incorporated as they are not necessary. This section does not deal

with responsibility for loss caused by the wrongful act of either the lessor or the lessee.

Cross References: Sections 2-509(1), 2-509(2) and 2-509(4).

Definitional Cross References: "Delivery". Section 1-201(14).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Receipt". Section 2-103(1)(c).

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x).

28-12-220. Effect of default on risk of loss. — (1) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(a) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

(b) If the lessee rightfully revokes acceptance, he, to the extent of any deficiency in his effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

History.

I.C., § 28-12-220, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-510.

Changes: Revised to reflect leasing practices and terminology. The rule in Section (1)(b) does not allow the lessee under a finance lease to treat the risk of loss as having remained with the supplier from the beginning. This is appropriate given the limited circumstances under which the lessee under a finance lease is allowed to revoke acceptance.

Section 2A-517 and Section 2A-516 official comment.

Definitional Cross References: "Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

“Reasonable time”. Section 1-204 [1-205] (1) and (2).

“Rights”. Section 1-201(36).
“Supplier”. Section 2A-103(1)(x).

28-12-221. Casualty to identified goods. — If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or section 28-12-219[, Idaho Code], then:

(1) If the loss is total, the lease contract is avoided; and

(2) If the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

History.

I.C., § 28-12-221, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion near the end of the introductory paragraph was added by the

compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-613.

Changes: Revised to reflect leasing practices and terminology.

Purpose: Due to the vagaries of determining the amount of due allowance (Section 2-613(b)), no attempt was made in subsection (b) to treat a problem unique to lease contracts and installment sales contracts: determining how to recapture the allowance, e.g., application to the first or last rent payments or allocation, pro rata, to all rent payments.

Cross References: Section 2-613.

Definitional Cross References: “Conforming”. Section 2A-103(1)(d).

“Consumer lease”. Section 2A-103(1)(e).

“Delivery”. Section 1-201(14).

“Fault”. Section 2A-103(1)(f).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Rights”. Section 1-201(36).

“Supplier”. Section 2A-103(1)(x).

PART 3. EFFECT OF LEASE CONTRACT

28-12-301. Enforceability of lease contract. — Except as otherwise provided in this chapter, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties.

History.

I.C., § 28-12-301, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-201.

Changes: The first sentence of Section 9-201 was incorporated, modified to reflect leasing terminology. The second sentence of Section 9-201 was eliminated as not relevant to leasing practices.

Purposes: 1. This section establishes a general rule regarding the validity and enforceability of a lease contract. The lease contract is effective and enforceable between the parties and against third parties. Exceptions to this general rule arise where there is a specific rule to the contrary in this Article. Enforceability is, thus, dependent upon the lease contract meeting the requirements of the Statute of Frauds provisions of Section 2A-201. Enforceability is also a function of the lease contract conforming to the principles of construction and interpretation contained in the Article on General Provisions (Article 1). Section 2A-103(4).

2. The effectiveness or enforceability of the lease contract is not dependent upon the lease contract or any financing statement or the like being filed or recorded; however, the priority of the interest of a lessor of fixtures with respect to the interests of certain third parties in such fixtures is subject to the provisions of the Article on Secured Transactions (Article 9). Section 2A-309. Prior to the adoption of this Article filing or recording was not required with respect to leases, only leases intended as security. The definition of security interest, as amended concurrently with the adoption of this Article, more clearly delineates leases and leases intended as security and thus signals the need to file. Section 1-201(37). Those lessors who are concerned about whether the transaction creates a lease or a security interest will continue to file a protective financing statement. Section 9-408. Coogan, *Leasing and the Uniform Commercial Code*, in *Equipment Leasing-Leveraged Leasing* 681, 744-46 (2d ed. 1980).

3. Hypothetical: (a) In construing this section it is important to recognize its relationship to other sections in this Article. This is best demonstrated by reference to a hypothetical. Assume that on February 1 A, a manufacturer of combines and other farm equipment, leased a fleet of six combines to B, a corporation engaged in the business of farming, for a 12 month term. Under the lease agreement between A and B, A agreed to defer B's payment of the first two months' rent to April 1. On March 1 B recognized that it would need only four combines and thus subleased two combines to C for an 11 month term.

(b) This hypothetical raises a number of issues that are answered by the sections con-

tained in this part. Since lease is defined to include sublease (Section 2A-103(1)(j) and (w)), this section provides that the prime lease between A and B and the sublease between B and C are enforceable in accordance with their terms, except as otherwise provided in this Article; that exception, in this case, is one of considerable scope.

(c) The separation of ownership, which is in A, and possession, which is in B with respect to four combines and which is in C with respect to two combines, is not relevant. Section 2A-302. A's interest in the six combines cannot be challenged simply because A parted with possession to B, who in turn parted with possession of some of the combines to C. Yet it is important to note that by the terms of Section 2A-302 this conclusion is subject to change if otherwise provided in this Article.

(d) B's entering the sublease with C raises an issue that is treated by this part. In a dispute over the leased combines A may challenge B's right to sublease. The rule is permissive as to transfers of interests under a lease contract, including subleases. Section 2A-303(2). However, the rule has two significant qualifications. If the prime lease contract between A and B prohibits B from subleasing the combines, or makes such a sublease an event of default, Section 2A-303(2) applies; thus, while B's interest under the prime lease may not be transferred under the sublease to C, A may have a remedy pursuant to Section 2A-303(5). Absent a prohibition or default provision in the prime lease contract A might be able to argue that the sublease to C materially increases A's risk; thus, while B's interest under the prime lease may be transferred under the sublease to C, A may have a remedy pursuant to Section 2A-303(5). Section 2A-303(5)(b)(ii).

(e) Resolution of this issue is also a function of the section dealing with the sublease of goods by a prime lessee (Section 2A-305). Subsection (1) of Section 2A-305, which is subject to the rules of Section 2A-303 stated above, provides that C takes subject to the interest of A under the prime lease between A and B. However, there are two exceptions. First, if B is a merchant (Sections 2A-103(3) and 2-104(1)) dealing in goods of that kind and C is a sublessee in the ordinary course of business (Sections 2A-103(1)(o) and 2A-103(1)(n)), C takes free of the prime lease between A and B. Second, if B has rejected the six combines under the prime lease with A, and B disposes of the goods by sublease to C, C takes free of the prime lease if C can establish good faith. Section 2A-511(4).

(f) If the facts of this hypothetical are expanded and we assume that the prime lease obligated B to maintain the combines, an

additional issue may be presented. Prior to entering the sublease, B, in satisfaction of its maintenance covenant, brought the two combines that it desired to sublease to a local independent dealer of A's. The dealer did the requested work for B. C inspected the combines on the dealer's lot after the work was completed. C signed the sublease with B two days later. C, however, was prevented from taking delivery of the two combines as B refused to pay the dealer's invoice for the repairs. The dealer furnished the repair service to B in the ordinary course of the dealer's business. If under applicable law the dealer has a lien on repaired goods in the dealer's possession, the dealer's lien will take priority over B's and C's interests, and also should take priority over A's interest, depending upon the terms of the lease contract and the applicable law. Section 2A-306.

(g) Now assume that C is in financial straits and one of C's creditors obtains a judgment against C. If the creditor levies on C's subleasehold interest in the two combines, who will prevail? Unless the levying creditor also holds a lien covered by Section 2A-306, discussed above, the judgment creditor will take its interest subject to B's rights under the sublease and A's rights under the prime lease. Section 2A-307(1). The hypothetical becomes more complicated if we assume that B is in financial straits and B's creditor holds the judgment. Here the judgment creditor takes subject to the sublease unless the lien attached to the two combines before the sublease contract became enforceable. Section 2A-307(2)(a). However, B's judgment creditor cannot prime A's interest in the goods because, with respect to A, the judgment creditor is a creditor of B in its capacity as lessee under the prime lease between A and B. Thus, here the judgment creditor's interest is subject to the lease between A and B. Section 2A-307(1).

(h) Finally, assume that on April 1 B is unable to pay A the deferred rent then due under the prime lease, but that C is current in its payments under the sublease from B. What effect will B's default under the prime lease between A and B have on C's rights under the sublease between B and C? Section 2A-301 provides that a lease contract is effective against the creditors of either party. Since a lease contract includes a sublease contract (Section 2A-103(1)(l)), the sublease contract between B and C arguably could be enforceable against A, a prime lessor who has extended unsecured credit to B the prime lessee/sublessor, if the sublease contract meets the requirements of Section 2A-201. However, the rule stated in Section 2A-301 is subject to other provisions in this Article. Under Section 2A-305, C, as sublessee, would take subject to the prime lease contract in

most cases. Thus, B's default under the prime lease will in most cases lead to A's recovery of the goods from C. Section 2A-523. A and C could provide otherwise by agreement. Section 2A-311. C's recourse will be to assert a claim for damages against B. Sections 2A-211(1) and 2A-508.

4. Relationship Between Sections: (a) As the analysis of the hypothetical demonstrates, Part 3 of the Article focuses on issues that relate to the enforceability of the lease contract (Sections 2A-301, 2A-302 and 2A-303) and to the priority of various claims to the goods subject to the lease contract (Sections 2A-304, 2A-305, 2A-306, 2A-307, 2A-308, 2A-309, 2A-310, and 2A-311).

(b) This section states a general rule of enforceability, which is subject to specific rules to the contrary stated elsewhere in the Article. Section 2A-302 negates any notion that the separation of title and possession is fraudulent as a rule of law. Finally, Section 2A-303 states rules with respect to the transfer of the lessor's interest (as well as the residual interest in the goods) or the lessee's interest under the lease contract. Qualifications are imposed as a function of various issues, including whether the transfer is the creation or enforcement of a security interest or one that is material to the other party to the lease contract. In addition, a system of rules is created to deal with the rights and duties among assignor, assignee and the other party to the lease contract.

(c) Sections 2A-304 and 2A-305 are twins that deal with good faith transferees of goods subject to the lease contract. Section 2A-304 creates a set of rules with respect to transfers by the lessor of goods subject to a lease contract; the transferee considered is a subsequent lessee of the goods. The priority dispute covered here is between the subsequent lessee and the original lessee of the goods (or persons claiming through the original lessee). Section 2A-305 creates a set of rules with respect to transfers by the lessee of goods subject to a lease contract; the transferees considered are buyers of the goods or sublessees of the goods. The priority dispute covered here is between the transferee and the lessor of the goods (or persons claiming through the lessor).

(d) Section 2A-306 creates a rule with respect to priority disputes between holders of liens for services or materials furnished with respect to goods subject to a lease contract and the lessor or the lessee under that contract. Section 2A-307 creates a rule with respect to priority disputes between the lessee and creditors of the lessor and priority disputes between the lessor and creditors of the lessee.

(e) Section 2A-308 creates a series of rules relating to allegedly fraudulent transfers and

preferences. The most significant rule is that set forth in subsection (3) which validates sale-leaseback transactions if the buyer-lessee can establish that he or she bought for value and in good faith.

(f) Sections 2A-309 and 2A-310 create a series of rules with respect to priority disputes between various third parties and a lessor of fixtures or accessions, respectively, with respect thereto.

(g) Finally, Section 2A-311 allows parties to alter the statutory priorities by agreement.

Cross References: Article 1, especially Section 1-201(37), and Sections 2-104(1), 2A-

103(1)(j), 2A-103(1)(l), 2A-103(1)(n), 2A-103(1)(o) and 2A-103(1)(w), 2A-103(3), 2A-103(4), 2A-201, 2A-301 through 2A-303, 2A-303(2), 2A-303(5), 2A-304 through 2A-307, 2A-307(1), 2A-307(2)(a), 2A-308 through 2A-311, 2A-508, 2A-511(4), 2A-523, Article 9, especially Sections 9-201 and 9-408.

Definitional Cross References: "Creditor". Section 1-201(12).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Purchaser". Section 1-201(30).

"Term". Section 1-201(42).

28-12-302. Title to and possession of goods. — Except as otherwise provided in this chapter, each provision of this chapter applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

History.

I.C., § 28-12-302, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-202.

Changes: Section 9-202 was modified to reflect leasing terminology and to clarify the law of leases with respect to fraudulent conveyances or transfers.

Purposes: The separation of ownership and possession of goods between the lessor and the lessee (or a third party) has created problems under certain fraudulent conveyance statutes. See, e.g., *In re Ludlum Enters.*, 510 F.2d 996 (5th Cir. 1975); *Suburbia Fed.*

Sav. & Loan Ass'n v. Bel-Air Conditioning Co., 385 So.2d 1151 (Fla. Dist. Ct. App. 1980). This section provides, among other things, that separation of ownership and possession per se does not affect the enforceability of the lease contract. Sections 2A-301 and 2A-308.

Cross References: Sections 2A-301, 2A-308 and 9-202.

Definitional Cross References: "Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

28-12-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods — Delegation of performance — Transfer of rights. — (1) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to chapter 9, title 28, Idaho Code, secured transactions, by reason of section 28-9-109(a)(3)[, Idaho Code].

(2) Except as provided in subsection (3) of this section and section 28-9-407[, Idaho Code], a provision in a lease agreement which: (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4) of this section, but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which: (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4) of this section.

(4) Subject to the provisions of subsection (3) of this section and section 28-9-407[, Idaho Code]:

(a) If a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in section 28-12-501(2)[, Idaho Code];

(b) If paragraph (a) of this subsection is not applicable and if a transfer is made that: (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

(5) A transfer of "the lease" or of "all my rights under the lease," or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous.

History.

I.C., § 28-12-303, as added by 1993, ch.

287, § 1, p. 977; am. 2001, ch. 208, § 21, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (1), (2), and (4) were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-210 and 9-311.

Changes: The provisions of Sections 2-210 and 9-311 were incorporated in this section, with substantial modifications to reflect leasing terminology and practice and to harmonize the principles of the respective provisions, i.e., limitations on delegation of performance on the one hand and alienability of rights on the other. In addition, unlike Section 2-210 which deals only with voluntary transfers, this section deals with involuntary as well as voluntary transfers. Moreover, the principle of Section 9-318(4) denying effectiveness to contractual terms prohibiting assignments of receivables due and to become due also is implemented.

Purposes: 1. Subsection (2) states a rule, consistent with Section 9-311, that voluntary and involuntary transfers of an interest of a party under the lease contract or of the lessor's residual interest, including by way of the creation or enforcement of a security interest, are effective, notwithstanding a provision in the lease agreement prohibiting the transfer or making the transfer an event of default. Although the transfers are effective, the provision in the lease agreement is nevertheless enforceable, but only as provided in subsection (5). Under subsection (5) the prejudiced party is limited to the remedies on "default under the lease contract" in this Article and, except as limited by this Article, as provided in the lease agreement, if the transfer has been made an event of default. Section 2A-501(2). Usually, there will be a specific provision to this effect or a general provision making a breach of a covenant an event of default. In those cases where the transfer is prohibited, but not made an event of default, the prejudiced party may recover damages; or, if the damage remedy would be ineffective adequately to protect that party, the court can order cancellation of the lease contract or enjoin the transfer. This rule that such provisions generally are enforceable is subject to subsections (3) and (4), which make such provisions unenforceable in certain instances.

2. The first such instance is described in subsection (3). A provision in a lease agreement which prohibits the creation or enforcement of a security interest, including sales of lease contracts subject to Article 9 (Sections 9-102(1)(b) and 9-104(f)), or makes it an event of default is generally not enforceable, reflecting the policy of Section 9-318(4). However, that policy gives way to the doctrine stated in Section 2-210(2), which gives one party to a contract the right to protect itself against an actual delegation (but not just a provision under which delegation might later occur) of a material performance by the other party. Ac-

cordingly, such a provision in a lease agreement is enforceable when the transfer delegates a material performance. Generally, as expressly provided in subsection (6), a transfer for security is not a delegation of duties. However, inasmuch as the creation of a security interest includes the sale of a lease contract, if there are then unperformed duties on the part of the lessor/seller, there could be a delegation of duties in the sale, and, if such a delegation actually takes place and is of a material performance, a provision in a lease agreement prohibiting it or making it an event of default would be enforceable, giving rise to the rights and remedies stated in subsection (5). The statute does not define "material." The parties may set standards to determine its meaning. The term is intended to exclude delegations of matters such as accounting to a professional accountant and the performance of, as opposed to the responsibility for, maintenance duties to a person in the maintenance service industry.

3. For similar reasons, the lessor is entitled to protect its residual interest in the goods by prohibiting anyone but the lessee from possessing or using them. Accordingly, under subsection (3) if there is an actual transfer by the lessee of its right of possession or use of the goods in violation of a provision in the lease agreement, such a provision likewise is enforceable, giving rise to the rights and remedies stated in subsection (5). A transfer of the lessee's right of possession or use of the goods resulting from the enforcement of a security interest granted by the lessee in its leasehold interest is a "transfer by the lessee" under this subsection.

4. Finally, subsection (3) protects against a claim that the creation or enforcement of a security interest in the lessor's interest under the lease contract or in the residual interest is a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on the lessee so as to give rise to the rights and remedies stated in subsection (5), unless the transfer involves an actual delegation of a material performance of the lessor.

5. While it is not likely that a transfer by the lessor of its right to payment under the lease contract would impair at a future time the ability of the lessee to obtain the performance due the lessee under the lease contract from the lessor, if under the circumstances reasonable grounds for insecurity as to receiving that performance arise, the lessee may employ the provision of this Article for demanding adequate assurance of due performance and has the remedy provided in that circumstance. Section 2A-401.

6. Sections 9-206 and 9-318(1) through (3) also are relevant. Section 9-206 sanctions an agreement by a lessee not to assert certain types of claims or defenses against the lessor's assignee. Section 9-318(1) through (3) deal with, among other things, the other party's rights against the assignee where Section 9-206(1) does not apply. Since the definition of contract under Section 1-201(11) includes a lease agreement, the definition of account debtor under Section 9-105(1)(a) includes a lessee of goods. As a result, Section 9-206 applies to lease agreements, and there is no need to restate those sections in this Article. The reference to "defenses or claims arising out of a sale" in Section 9-318(1) should be interpreted broadly to include defenses or claims arising out of a lease inasmuch as that section codifies the common law rule with respect to contracts, including lease contracts.

7. Subsection (4) is based upon Section 2-210(2) and Section 9-318(4). It makes unenforceable a prohibition against transfers of certain rights to payment or a provision making the transfer an event of default. It also provides that such transfers do not materially impair the prospect of obtaining return performance by, materially change the duty of, or materially increase the burden or risk imposed on, the other party to the lease contract so as to give rise to the rights and remedies stated in subsection (5). Accordingly, a transfer of a right to payment cannot be prohibited or made an event of default, or be one that materially impairs performance, changes duties or increases risk, if the right is already due or will become due without further performance being required by the party to receive payment. Thus, a lessor can transfer the right to future payments under the lease contract, including by way of a grant of a security interest, and the transfer will not give rise to the rights and remedies stated in subsection (5) if the lessor has no remaining performance under the lease contract. The mere fact that the lessor is obligated to allow the lessee to remain in possession and to use the goods as long as the lessee is not in default does not mean that there is "remaining performance" on the part of the lessor. Likewise, the fact that the lessor has potential liability under a "non-operating" lease contract for breaches of warranty does not mean that there is "remaining performance." In contrast, the lessor would have "remaining performance" under a lease contract requiring the lessor to regularly maintain and service the goods or to provide "upgrades" of the equipment on a periodic basis in order to avoid obsolescence. The basic distinction is between a mere potential duty to respond which is not "remaining performance," and an affirmative duty to render stipulated performance. Although the distinction may be difficult to

draw in some cases, it is instructive to focus on the difference between "operating" and "non-operating" leases as generally understood in the marketplace. Even if there is "remaining performance" under a lease contract, a transfer for security of a right to payment that is made an event of default or that is in violation of a prohibition against transfer does not give rise to the rights and remedies under subsection (5) if it does not constitute an actual delegation of a material performance under subsection (3).

8. The application of either the rule of subsection (3) or the rule of subsection (4) to the grant by the lessor of a security interest in the lessor's right to future payment under the lease contract may produce the same result. Both subsections generally protect security transfers by the lessor in particular because the creation by the lessor of a security interest or the enforcement of that interest generally will not prejudice the lessee's rights if it does not result in a delegation of the lessor's duties. To the contrary, the receipt of loan proceeds or relief from the enforcement of an antecedent debt normally should enhance the lessor's ability to perform its duties under the lease contract. Nevertheless, there are circumstances where relief might be justified. For example, if ownership of the goods is transferred pursuant to enforcement of a security interest to a party whose ownership would prevent the lessee from continuing to possess the goods, relief might be warranted. See 49 U.S.C. § 1401(a) and (b) which places limitations on the operation of aircraft in the United States based on the citizenship or corporate qualification of the registrant.

9. Relief on the ground of material prejudice when the lease agreement does not prohibit the transfer or make it an event of default should be afforded only in extreme circumstances, considering the fact that the party asserting material prejudice did not insist upon a provision in the lease agreement that would protect against such a transfer.

10. Subsection (5) implements the rule of subsection (2). Subsection (2) provides that, even though a transfer is effective, a provision in the lease agreement prohibiting it or making it an event of default may be enforceable as provided in subsection (5). See *Brummond v. First National Bank of Clovis*, 656 P.2d 884, 35 U.C.C. Rep. Serv. (Callaghan) 1311 (N. Mex. 1983), stating the analogous rule for Section 9-311. If the transfer prohibited by the lease agreement is made an event of default, then, under subsection 5(a), unless the default is waived or there is an agreement otherwise, the aggrieved party has the rights and remedies referred to in Section 2A-501(2), viz. those in this Article and, except as limited in the Article, those provided in the lease agreement. In the unlikely circumstance that

the lease agreement prohibits the transfer without making a violation of the prohibition an event of default or, even if there is no prohibition against the transfer, and the transfer is one that materially impairs performance, changes duties, or increases risk (for example, a sublease or assignment to a party using the goods improperly or for an illegal purpose), then subsection 5(b) is applicable. In that circumstance, unless the party aggrieved by the transfer has otherwise agreed in the lease contract, such as by assenting to a particular transfer or to transfers in general, or agrees in some other manner, the aggrieved party has the right to recover damages from the transferor and a court may, in appropriate circumstances, grant other relief, such as cancellation of the lease contract or an injunction against the transfer.

11. If a transfer gives rise to the rights and remedies provided in subsection (5), the transferee as an alternative may propose, and the other party may accept, adequate cure or compensation for past defaults and adequate assurance of future due performance under the lease contract. Subsection (5) does not preclude any other relief that may be available to a party to the lease contract aggrieved by a transfer subject to an enforceable prohibition, such as an action for interference with contractual relations.

12. Subsection (8) requires that a provision in a consumer lease prohibiting a transfer, or making it an event of default, must be specific, written and conspicuous. See Section 1-201(10). This assists in protecting a consumer lessee against surprise assertions of default.

13. Subsection (6) is taken almost verbatim from the provisions of Section 2-210(4). The subsection states a rule of construction that

distinguishes a commercial assignment, which substitutes the assignee for the assignor as to rights and duties, and an assignment for security or financing assignment, which substitutes the assignee for the assignor only as to rights. Note that the assignment for security or financing assignment is a subset of all security interests. Security interest is defined to include "any interest of a buyer of . . . chattel paper". Section 1-201(37). Chattel paper is defined to include a lease. Section 9-105(1)(b). Thus, a buyer of leases is the holder of a security interest in the leases. That conclusion should not influence this issue, as the policy is quite different. Whether a buyer of leases is the holder of a commercial assignment, or an assignment for security or financing assignment should be determined by the language of the assignment or the circumstances of the assignment.

Cross References: Sections 1-201(11), 1-201(37), 2-210, 2A-401, 9-102(1)(b), 9-104(f), 9-105(1)(a), 9-206, and 9-318.

Definitional Cross References: "Agreed" and "Agreement". Section 1-201(3). "Conspicuous". Section 1-201(10).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Lessor's residual interest". Section 2A-103(1)(q).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

"Person". Section 1-201(30).

"Reasonable time". Section 1-204 [1-205] (1) and (2).

"Rights". Section 1-201(36).

"Term". Section 1-201(42).

"Writing". Section 1-201(46).

28-12-304. Subsequent lease of goods by lessor. — (1) Subject to section 28-12-303[, Idaho Code], a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsection (2) of this section and section 28-12-527(4)[, Idaho Code], takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:

- (a) The lessor's transferor was deceived as to the identity of the lessor;
- (b) The delivery was in exchange for a check which is later dishonored;
- (c) It was agreed that the transaction was to be a "cash sale"; or
- (d) The delivery was procured through fraud punishable as larcenous under the criminal law.

- (2) A subsequent lessee in the ordinary course of business from a lessor

who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor's and the existing lessee's rights to the goods, and takes free of the existing lease contract.

(3) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

History.

I.C., § 28-12-304, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in the introductory paragraph in subsection (1) were added

by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-403.

Changes: While Section 2-403 was used as a model for this section, the provisions of Section 2-403 were significantly revised to reflect leasing practices and to integrate this Article with certificate of title statutes.

Purposes: 1. This section must be read in conjunction with, as it is subject to, the provisions of Section 2A-303, which govern voluntary and involuntary transfers of rights and duties under a lease contract, including the lessor's residual interest in the goods.

2. This section must also be read in conjunction with Section 2-403. This section and Section 2A-305 are derived from Section 2-403, which states a unified policy on good faith purchases of goods. Given the scope of the definition of purchaser (Section 1-201(30)), a person who bought goods to lease as well as a person who bought goods subject to an existing lease from a lessor will take pursuant to Section 2-403. Further, a person who leases such goods from the person who bought them should also be protected under Section 2-403, first because the lessee's rights are derivative and second because the definition of purchaser should be interpreted to include one who takes by lease; no negative implication should be drawn from the inclusion of lease in the definition of purchase in this Article. Section 2A-103(1)(v).

3. There are hypotheticals that relate to an entrustee's unauthorized lease of entrusted goods to a third party that are outside the provisions of Sections 2-403, 2A-304 and 2A-

305. Consider a sale of goods by M, a merchant, to B, a buyer. After paying for the goods B allows M to retain possession of the goods as B is short of storage. Before B calls for the goods M leases the goods to L, a lessee. This transaction is not governed by Section 2-403(2) as L is not a buyer in the ordinary course of business. Section 1-201(9). Further, this transaction is not governed by Section 2A-304(2) as B is not an existing lessee. Finally, this transaction is not governed by Section 2A-305(2) as B is not M's lessor. Section 2A-307(2) resolves the potential dispute between B, M and L. By virtue of B's entrustment of the goods to M and M's lease of the goods to L, B has a cause of action against M under the common law. Sections 2A-103(4) and 1-103. See, e.g., Restatement (Second) of Torts §§ 222A — 243. Thus, B is a creditor of M. Sections 2A-103(4) and 1-201(12). Section 2A-307(2) provides that B, as M's creditor, takes subject to M's lease to L. Thus, if L does not default under the lease, L's enjoyment and possession of the goods should be undisturbed. However, B is not without recourse. B's action should result in a judgment against M providing, among other things, a turnover of all proceeds arising from M's lease to L, as well as a transfer of all of M's right, title and interest as lessor under M's lease to L, including M's residual interest in the goods. Section 2A-103(1)(q).

4. Subsection (1) states a rule with respect to the leasehold interest obtained by a subsequent lessee from a lessor of goods under an existing lease contract. The interest will in-

clude such leasehold interest as the lessor has in the goods as well as the leasehold interest that the lessor had the power to transfer. Thus, the subsequent lessee obtains unimpaired all rights acquired under the law of agency, apparent agency, ownership or other estoppel, whether based upon statutory provisions or upon case law principles. Sections 2A-103(4) and 1-103. In general, the subsequent lessee takes subject to the existing lease contract, including the existing lessee's rights thereunder. Furthermore, the subsequent lease contract is, of course, limited by its own terms, and the subsequent lessee takes only to the extent of the leasehold interest transferred thereunder.

5. Subsection (1) further provides that a lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value. In addition, subsections (1)(a) through (d) provide specifically for the protection of the good faith subsequent lessee for value in a number of specific situations which have been troublesome under prior law.

6. The position of an existing lessee who entrusts leased goods to its lessor is not distinguishable from the position of other entrusters. Thus, subsection (2) provides that the subsequent lessee in the ordinary course of business takes free of the existing lease contract between the lessor entruster and the lessee entruster, if the lessor is a merchant dealing in goods of that kind. Further, the subsequent lessee obtains all of the lessor entruster's and the lessee entruster's rights to the goods, but only to the extent of the leasehold interest transferred by the lessor entruster. Thus, the lessor entruster retains the residual interest in the goods. Section 2A-103(1)(q). However, entrustment by the existing lessee must have occurred before the interest of the subsequent lessee became enforceable against the lessor. Entrusting is defined in Section 2-403(3) and that definition applies here. Section 2A-103(3).

7. Subsection (3) states a rule with respect to a transfer of goods from a lessor to a subsequent lessee where the goods are subject to an existing lease and covered by a certificate of title. The subsequent lessee's rights are no greater than those provided by this section and the applicable certificate of title statute, including any applicable case law construing such statute. Where the relationship between the certificate of title statute and Section 2-403, the statutory analogue to this section, has been construed by a court, that construction is incorporated here. Sections 2A-103(4) and 1-102(1) and (2). The better rule is that the certificate of title statutes are in harmony with Section 2-403 and thus would be in harmony with this section. E.g., *Atwood Chevrolet-Olds v. Aberdeen Mun. School Dist.*, 431 So.2d 926, 928, (Miss. 1983); *Godfrey v. Gilsdorf*, 476 P.2d 3, 6, 86 Nev. 714, 718 (1970); *Martin v. Nager*, 192 N.J. Super. 189, 197-98, 469 A.2d 519, 523 (Super. Ct. Ch. Div. 1983). Where the certificate of title statute is silent on this issue of transfer, this section will control.

Cross References: Sections 1-102, 1-103, 1-201(33), 2-403, 2A-103(1)(v), 2A-103(3), 2A-103(4), 2A-303 and 2A-305.

Definitional Cross References: "Agreed". Section 1-201(3).

"Delivery". Section 1-201(14).

"Entrusting". Section 2-403(3).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessee in the ordinary course of business". Section 2A-103(1)(o).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Purchase". Section 2A-103(1)(v).

"Rights". Section 1-201(36).

"Value". Section 1-201(44) [now 1-204].

28-12-305. Sale or sublease of goods by lessee. — (1) Subject to the provisions of section 28-12-303[, Idaho Code], a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) of this section and section 28-12-511(4)[, Idaho Code], takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

(a) The lessor was deceived as to the identity of the lessee;

(b) The delivery was in exchange for a check which is later dishonored; or

(c) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(3) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

History.

I.C., § 28-12-305, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in the introductory paragraph in subsection (1) were added

by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-403.

Changes: While Section 2-403 was used as a model for this section, the provisions of Section 2-403 were significantly revised to reflect leasing practice and to integrate this Article with certificate of title statutes.

Purposes: This section, a companion to Section 2A-304, states the rule with respect to the leasehold interest obtained by a buyer or sublessee from a lessee of goods under an existing lease contract. Cf. Section 2A-304 official comment. Note that this provision is consistent with existing case law, which prohibits the bailee's transfer of title to a good faith purchaser for value under Section 2-403(1). *Rohweder v. Aberdeen Product Credit Ass'n*, 765 F.2d 109 (8th Cir. 1985).

Subsection (2) is also consistent with existing case law. *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248, 269-70 (5th Cir. 1981); but cf. *Exxon Co., U.S.A. v. TLW Computer Indus.*, 37 U.C.C. Rep. Serv. (Callaghan) 1052, 1057-58 (D. Mass. 1983). Unlike Section 2A-304(2), this subsection does not contain any requirement with respect to the time that the goods were entrusted to the merchant. In Section 2A-304(2) the competition is between two customers of the merchant lessor; the time of entrusting was added as a criterion to create additional protection to the customer who was first in time: the existing lessee. In subsection (2) the equities between the competing interests were viewed as balanced.

There appears to be some overlap between Section 2-403(2) and Section 2A-305(2) with respect to a buyer in the ordinary course of business. However, an examination of this Article's definition of buyer in the ordinary course of business (Section 2A-103(1)(a)) makes clear that this reference was necessary to treat entrusting in the context of a lease.

Subsection (3) states a rule of construction with respect to a transfer of goods from a lessee to a buyer or sublessee, where the goods are subject to an existing lease and covered by a certificate of title. Cf. Section 2A-304 official comment.

Cross References: Sections 2-403, 2A-103(1)(a), 2A-304 and 2A-305(2).

Definitional Cross References: "Buyer". Section 2-103(1)(a).

"Buyer in the ordinary course of business". Section 2A-103(1)(a).

"Delivery". Section 1-201(14).

"Entrusting". Section 2-403(3).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessee in the ordinary course of business". Section 2A-103(1)(o).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Rights". Section 1-201(36).

"Sale". Section 2-106(1).

"Sublease". Section 2A-103(1)(w).

"Value". Section 1-201(44) [now 1-204].

28-12-306. Priority of certain liens arising by operation of law. —

If a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this chapter unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

History.

I.C., § 28-12-306, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-310.

Changes: The approach reflected in the provisions of Section 9-310 was included, but revised to conform to leasing terminology and to expand the exception to the special priority granted to protected liens to cover liens created by rule of law as well as those created by statute.

Purposes: This section should be interpreted to allow a qualified lessor or a qualified lessee to be the competing lienholder if the statute or rule of law so provides. The refer-

ence to statute includes applicable regulations and cases; these sources must be reviewed in resolving a priority dispute under this section.

Cross Reference: Section 9-310.

Definitional Cross References: "Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Lien". Section 2A-103(1)(r).

"Person". Section 1-201(30).

28-12-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods. — (1) Except as otherwise provided in section 28-12-306[, Idaho Code], a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsection (3) of this section and in sections 28-12-306 and 28-12-308[, Idaho Code], a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(3) Except as otherwise provided in sections 28-9-317, 28-9-321 and 28-9-323[, Idaho Code], a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.

History.

I.C., § 28-12-307, as added by 1993, ch.

287, § 1, p. 977; am. 2001, ch. 208, § 22, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

Uniform Statutory Source: None for subsection (1). Subsection (2) is derived from Section 9-301, and subsections (3) and (4) are derived from Section 9-307(1) and (3), respectively.

Changes: The provisions of Sections 9-301 and 9-307(1) and (3) were incorporated, and modified to reflect leasing terminology and the basic concepts reflected in this Article.

Purposes: 1. Subsection (1) states a general rule of priority that a creditor of the lessee takes subject to the lease contract. The term lessee (Section 2A-103(1)(n)) includes sublessee. Therefore, this subsection not only covers disputes between the prime lessor and a creditor of the prime lessee but also disputes between the prime lessor, or the sublessor, and a creditor of the sublessee. Section 2A-301 official comment 3(g). Further, by using the term creditor (Section 1-201(12)), this subsection will cover disputes with a general creditor, a secured creditor, a lien creditor and any representative of creditors. Section 2A-103(4).

2. Subsection (2) states a general rule of priority that a creditor of a lessor takes subject to the lease contract. Note the discussion above with regard to the scope of these rules. Section 2A-301 official comment 3(g). Thus, the section will not only cover disputes between the prime lessee and a creditor of the prime lessor but also disputes between the prime lessee, or the sublessee, and a creditor of the sublessor.

3. To take priority over the lease contract, and the interests derived therefrom, the creditor must come within one of three exceptions stated within the rule. First, subsection (2)(a) provides that where the creditor holds a lien (Section 2A-103(1)(r)) that attached before the lease contract became enforceable (Section 2A-301), the creditor does not take subject to the lease. Second, subsection (2)(b) provides that when the creditor holds a security interest (Section 1-201(37)), whether or not perfected, the creditor has priority over a lessee who did not give value (Section 1-201(44) [now 1-204]) and receive delivery of the goods without knowledge (Section 1-201(25)) of the security interest. As to other lessees, under subsection (2)(c) a secured creditor holding a perfected security interest before the time the lease contract became enforceable (Section 2A-301) does not take subject to the lease. With respect to this provision, the lessee in these circumstances is treated like a buyer so that perfection of a purchase money security interest does not relate back (Section 9-301).

4. The rules of this section operate in favor of whichever party to the lease contract may

enforce it, even if one party perhaps may not, e.g., under Section 2A-201(1)(b).

5. The rules stated in subsections (2)(b) and (c), and the rule in subsection (3), are best understood by reviewing a hypothetical. Assume that a merchant engaged in the business of selling and leasing musical instruments obtained possession of a truckload of musical instruments on deferred payment terms from a supplier of musical instruments on January 6. To secure payment of such credit the merchant granted the supplier a security interest in the instruments; the security interest was perfected by filing on January 15. The merchant, as lessor, entered into a lease to an individual of one of the musical instruments supplied by the supplier; the lease became enforceable on January 10. Under subsection (2)(b) the lessee will prevail (assuming the lessee qualifies thereunder) unless subsection (c) provides otherwise. Under the rule stated in subsection (2)(c) a priority dispute between the supplier, as the lessor's secured creditor, and the lessee would be determined by ascertaining on January 10 (the day the lease became enforceable) the validity and perfected status of the security interest in the musical instrument and the enforceability of the lease contract by the lessee. Nothing more appearing, under the rule stated in subsection (2)(c), the supplier's security interest in the musical instrument would not have priority over the lease contract. Moreover, subsection (2) states that its rules are subject to the rules of subsections (3) and (4). Under this hypothetical the lessee should qualify as a "lessee in the ordinary course of business". Section 2A-103(1)(o). Subsection (3) also makes clear that the lessee in the ordinary course of business will win even if he or she knows of the existence of the supplier's security interest.

6. Subsections (3) and (4), which are modeled on the provisions of Section 9-307(1) and (3), respectively, state two exceptions to the priority rule stated in subsection (2) with respect to a creditor who holds a security interest. The lessee in the ordinary course of business will be treated in the same fashion as the buyer in the ordinary course of business, given a priority dispute with a secured creditor over goods subject to a lease contract.

Cross References: Sections 1-201(12), 1-201(25), 1-201(37), 1-201(44) [now 1-204], 2A-103(1)(n), 2A-103(1)(o), 2A-103(1)(r), 2A-103(4), 2A-201(1)(b), 2A-301 official comment 3(g), Article 9, especially Sections 9-301, 9-307(1) and 9-307(3).

Definitional Cross References: "Creditor". Section 1-201(12).

"Goods". Section 2A-103(1)(h).

“Knowledge” and “Knows”. Section 1-201(25).

“Lease”. Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Leasehold interest”. Section 2A-103(1)(m).

“Lessee”. Section 2A-103(1)(n).

“Lessee in the ordinary course of business”. Section 2A-103(1)(o).

“Lessor”. Section 2A-103(1)(p).

“Lien”. Section 2A-103(1)(r).

“Party”. Section 1-201(29).

“Pursuant to commitment”. Section 2A-103(3).

“Security interest”. Section 1-201(37).

28-12-308. Special rights of creditors. — (1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

(2) Nothing in this chapter impairs the rights of creditors of a lessor if the lease contract (i) becomes enforceable, not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security, or the like, and (ii) is made under circumstances which under any statute or rule of law apart from this chapter would constitute the transaction a fraudulent transfer or voidable preference.

(3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

History.

I.C., § 28-12-308, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-402(2) and (3)(b).

Changes: Rephrased and new material added to conform to leasing terminology and practice.

Purposes: Subsection (1) states a general rule of avoidance where the lessor has retained possession of goods if such retention is fraudulent under any statute or rule of law. However, the subsection creates an exception under certain circumstances for retention of possession of goods for a commercially reasonable time after the lease contract becomes enforceable.

Subsection (2) also preserves the possibility of an attack on the lease by creditors of the lessor if the lease was made in satisfaction of or as security for a pre-existing claim, and would constitute a fraudulent transfer or voidable preference under other law.

Finally, subsection (3) states a new rule with respect to sale-leaseback transactions, i.e., transactions where the seller sells goods to a buyer but possession of the goods is retained by the seller pursuant to a lease contract between the buyer as lessor and the seller as lessee. Notwithstanding any statute or rule of law that would treat such retention as fraud, whether per se, prima facie, or otherwise, the retention is not fraudulent if the buyer bought for value (Section 1-201(44) [now 1-204]) and in good faith (Sections 1-201(19) and 2-103(1)(b)). Section 2A-103(3) and (4). This provision overrides Section 2-402(2) to the extent it would otherwise apply to a sale-leaseback transaction.

Cross References: Sections 1-201(19), 1-201(44) [now 1-204], 2-402(2) and 2A-103(4).

Definitional Cross References: “Buyer”. Section 2-103(1)(a).

| | |
|---|--|
| "Contract". Section 1-201(11). | "Money". Section 1-201(24). |
| "Creditor". Section 1-201(12). | "Reasonable time". Section 1-204 [1-205] (1) |
| "Good faith". Sections 1-201(19) and 2-103(1)(b). | and (2). |
| "Goods". Section 2A-103(1)(h). | "Rights". Section 1-201(36). |
| "Lease contract". Section 2A-103(1)(l). | "Sale". Section 2-106(1). |
| "Lessee". Section 2A-103(1)(n). | "Seller". Section 2-103(1)(d). |
| "Lessor". Section 2A-103(1)(p). | "Value". Section 1-201(44) [now 1-204]. |

28-12-309. Lessor's and lessee's rights when goods become fixtures. — (1) In this section:

- (a) Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;
- (b) A "fixture filing" is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of section 28-9-502(a) and (b)[, Idaho Code];
- (c) A lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;
- (d) A mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and
- (e) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(2) Under this chapter a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this chapter of ordinary building materials incorporated into an improvement on land.

(3) The provisions of this chapter do not prevent creation of a lease of fixtures pursuant to real estate law.

(4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

- (a) The lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within ten (10) days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or
- (b) The interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:

- (a) The fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domes-

tic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or

(b) The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or

(c) The encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(d) The lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(6) Notwithstanding the provisions of subsection (4)(a) of this section but otherwise subject to the provisions of subsections (4) and (5) of this section, the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may: (i) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this chapter, or (ii) if necessary to enforce his other rights and remedies of the lessor or lessee under this chapter, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

(9) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the chapter on secured transactions (chapter 9, title 28, Idaho Code).

History.

I.C., § 28-12-309, as added by 1993, ch.

287, § 1, p. 977; am. 2001, ch. 208, § 23, p. 704.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion at the end of paragraph (1)(b) was added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-313.

Changes: Revised to reflect leasing terminology and to add new material.

Purposes: 1. While Section 9-313 provided a model for this section, certain provisions were substantially revised.

2. Section 2A-309(1)(c), which is new, defines purchase money lease to exclude leases where the lessee had possession or use of the goods or the right thereof before the lease agreement became enforceable. This term is used in subsection (4)(a) as one of the conditions that must be satisfied to obtain priority over the conflicting interest of an encumbrancer or owner of the real estate.

3. Section 2A-309(4), which states one of several priority rules found in this section, deletes reference to office machines and the like (Section 9-313(4)(c)) as well as certain liens (Section 9-313(4)(d)). However, these items are included in subsection (5), another priority rule that is more permissive than the rule found in subsection (4) as it applies whether or not the interest of the lessor is perfected. In addition, subsection (5)(a) expands the scope of the provisions of Section 9-313(4)(c) to include readily removable equipment not primarily used or leased for use in the operation of real estate; the qualifier is intended to exclude from the expanded rule equipment integral to the operation of real estate, e.g., heating and air conditioning equipment.

4. The rule stated in subsection (7) is more liberal than the rule stated in Section 9-313(7) in that issues of priority not otherwise resolved in this subsection are left for resolution by the priority rules governing conflicting interests in real estate, as opposed to the Section 9-313(7) automatic subordination of the security interest in fixtures. Note that, for the purpose of this section, where the interest of an encumbrancer or owner of the real estate is paramount to the intent [interest] of the lessor, the latter term includes the residual interest of the lessor.

5. The rule stated in subsection (8) is more liberal than the rule stated in Section 9-313(8) in that the right of removal is extended to both the lessor and the lessee and the occasion for removal includes expiration,

termination or cancellation of the lease agreement, and enforcement of rights and remedies under this Article, as well as default. The new language also provides that upon removal the goods are free and clear of conflicting interests of owners and encumbrancers of the real estate.

6. Finally, subsection (9) provides a mechanism for the lessor of fixtures to perfect its interest by filing a financing statement under the provisions of the Article on Secured Transactions (Article 9), even though the lease agreement does not create a security interest. Section 1-201(37). The relevant provisions of Article 9 must be interpreted permissively to give effect to this mechanism as it implicitly expands the scope of Article 9 so that its filing provisions apply to transactions that create a lease of fixtures, even though the lease agreement does not create a security interest. This mechanism is similar to that provided in Section 2-326(3)(c) for the seller of goods on consignment, even though the consignment is not "intended as security". Section 1-201(37). Given the lack of litigation with respect to the mechanism created for consignment sales, this new mechanism should prove effective.

Cross References: Sections 1-201(37), 2A-309(1)(c), 2A-309(4), Article 9, especially Sections 9-313, 9-313(4)(c), 9-313(4)(d), 9-313(7), 9-313(8) and 9-408.

Definitional Cross References:

- "Agreed". Section 1-201(3).
- "Cancellation". Section 2A-103(1)(b).
- "Conforming". Section 2A-103(1)(d).
- "Consumer lease". Section 2A-103(1)(e).
- "Goods". Section 2A-103(1)(h).
- "Lease". Section 2A-103(1)(j).
- "Lease agreement". Section 2A-103(1)(k).
- "Lease contract". Section 2A-103(1)(l).
- "Lessee". Section 2A-103(1)(n).
- "Lessor". Section 2A-103(1)(p).
- "Lien". Section 2A-103(1)(r).
- "Mortgage". Section 9-105(1)(j).
- "Party". Section 1-201(29).
- "Person". Section 1-201(30).
- "Reasonable time". Section 1-204 [1-205] (1) and (2).
- "Remedy". Section 1-201(34).
- "Rights". Section 1-201(36).
- "Security interest". Section 1-201(37).
- "Termination". Section 2A-103(1)(z).

“Value”. Section 1-201(44) [now 1-204].

“Writing”. Section 1-201(46).

28-12-310. Lessor’s and lessee’s rights when goods become accessions. — (1) Goods are “accessions” when they are installed in or affixed to other goods.

(2) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection (4) of this section.

(3) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (4) of this section but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(4) The interest of a lessor or a lessee under a lease contract described in subsection (2) or (3) of this section is subordinate to the interest of:

(a) A buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or

(b) A creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

(5) When, under the provisions of subsections (2) or (3) and (4) of this section, a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this chapter, or (ii) if necessary to enforce his other rights and remedies under this chapter, remove the goods from the whole, free and clear of all interests in the whole, but he must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

History.

I.C., § 28-12-310, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-314.

Changes: Revised to reflect leasing terminology and to add new material.

Purposes: Subsections (1) and (2) restate the provisions of subsection (1) of Section 9-314 to clarify the definition of accession and

to add leasing terminology to the priority rule that applies when the lease is entered into before the goods become accessions. Subsection (3) restates the provisions of subsection (2) of Section 9-314 to add leasing terminology to the priority rule that applies when the lease is entered into on or after the goods

become accessions. Unlike the rule with respect to security interests, the lease is merely subordinate, not invalid.

Subsection (4) creates two exceptions to the priority rules stated in subsections (2) and (3). Subsection (4) deletes the special priority rule found in the provisions of Section 9-314(3)(b) as the interests of the lessor and lessee are entitled to greater protection.

Finally, subsection (5) is modeled on the provisions of Section 9-314(4) with respect to removal of accessions, restated to reflect the parallel changes in Section 2A-309(8).

Neither this section nor Section 9-314 governs where the accession to the goods is not subject to the interest of a lessor or a lessee under a lease contract and is not subject to the interest of a secured party under a security agreement. This issue is to be resolved by the courts, case by case.

Cross References: Sections 2A-309(8), 9-314(1), 9-314(2), 9-314(3)(b), 9-314(4).

Definitional Cross References:
 "Agreed". Section 1-201(3).
 "Buyer in the ordinary course of business". Section 2A-103(1)(a).
 "Cancellation". Section 2A-103(1)(b).
 "Creditor". Section 1-201(12).
 "Goods". Section 2A-103(1)(h).
 "Holder". Section 1-201(20).
 "Knowledge". Section 1-201(25).
 "Lease". Section 2A-103(1)(j).
 "Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessee in the ordinary course of business". Section 2A-103(1)(o).
 "Lessor". Section 2A-103(1)(p).
 "Party". Section 1-201(29).
 "Person". Section 1-201(30).
 "Remedy". Section 1-201(34).
 "Rights". Section 1-201(36).
 "Security interest". Section 1-201(37).
 "Termination". Section 2A-103(1)(z).
 "Value". Section 1-201(44) [now 1-204].
 "Writing". Section 1-201(46).

28-12-311. Priority subject to subordination. — Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

History.

I.C., § 28-12-311, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 9-316.

Purposes: The several preceding sections deal with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate the claim. Only the person entitled to priority may make such an agree-

ment: the rights of such a person cannot be adversely affected by an agreement to which that person is not a party.

Cross References: Sections 1-102 and 2A-304 through 2A-310.

Definitional Cross References: "Agreement". Section 1-201(3).

"Person". Section 1-201(30).

PART 4. PERFORMANCE OF LEASE CONTRACT — REPUDIATED, SUBSTITUTED AND EXCUSED

28-12-401. Insecurity — Adequate assurance of performance. — (1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed thirty (30) days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

History.

I.C., § 28-12-401, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-609.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (3) (Section 2-609(4)), the adjective "justified" modifies demand. The adjective was deleted here as unnecessary, implying no substantive change.

Definitional Cross References: "Aggrieved party". Section 1-201(2).

"Agreed". Section 1-201(3).

"Between merchants". Section 2-104(3).

"Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Reasonable time". Section 1-204 [1-205] (1) and (2).

"Receipt". Section 2-103(1)(c).

"Rights". Section 1-201(36).

"Writing". Section 1-201(46).

28-12-402. Anticipatory repudiation. — If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

(1) For a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;

(2) Make demand pursuant to section 28-12-401[, Idaho Code,] and await assurance of future performance adequate under the circumstances of the particular case; or

(3) Resort to any right or remedy upon default under the lease contract or this chapter, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this chapter on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (section 28-12-524[, Idaho Code]).

History.

I.C., § 28-12-402, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (2) and (3) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-610.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Aggrieved party". Section 1-201(2).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessor". Section 2A-103(1)(p).

"Notifies". Section 1-201(26).

"Party". Section 1-201(29).

"Reasonable time". Section 1-204 [1-205] (1) and (2).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

"Value". Section 1-201(44) [now 1-204].

28-12-403. Retraction of anticipatory repudiation. — (1) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has cancelled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under section 28-12-401[, Idaho Code].

(3) Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

History.

I.C., § 28-12-403, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion at the end of sub-

section (2) was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-611.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (2) (Section 2-611(2)) the adjective "justifiably" modifies demanded. The adjective was deleted here (as it was in Section 2A-401) as unnecessary, implying no substantive change.

Definitional Cross References: "Aggrieved party". Section 1-201(2).

"Cancellation". Section 2A-103(1)(b).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Rights". Section 1-201(36).

28-12-404. Substituted performance. — (1) If, without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

- (a) The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent; and
- (b) If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee’s obligation unless the regulation is discriminatory, oppressive, or predatory.

History.

I.C., § 28-12-404, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-614.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: “Agreed”. Section 1-201(3).

“Delivery”. Section 1-201(14).

“Fault”. Section 2A-103(1)(f).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Supplier”. Section 2A-103(1)(x).

28-12-405. Excused performance. — Subject to section 28-12-404[, Idaho Code,] on substituted performance, the following rules apply:

(1) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with the provisions of subsections (2) and (3) of this section is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(2) If the causes mentioned in subsection (1) of this section affect only part of the lessor’s or the supplier’s capacity to perform, he shall allocate production and deliveries among his customers but at his option may include regular customers not then under contract for sale or lease as well as his own requirements for further manufacture. He may so allocate in any manner that is fair and reasonable.

(3) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under the provisions of subsection (2) of this section, of the estimated quota thus made available for the lessee.

History.

I.C., § 28-12-405, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler’s Notes.

The bracketed insertion in the introductory

paragraph was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-615.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: “Agreed”. Section 1-201(3).

“Contract”. Section 1-201(11).

“Delivery”. Section 1-201(14).

“Finance lease”. Section 2A-103(1)(g).

“Good faith”. Sections 1-201(19) and 2-103(1)(b).

“Knows”. Section 1-201(25).

“Lease”. Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notifies”. Section 1-201(26).

“Sale”. Section 2-106(1).

“Seasonably”. Section 1-204 [1-205] (3).

“Supplier”. Section 2A-103(1)(x).

28-12-406. Procedure on excused performance. — (1) If the lessee receives notification of a material or indefinite delay or an allocation justified under the provisions of section 28-12-405[, Idaho Code], the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 28-12-510[, Idaho Code]):

- (a) Terminate the lease contract (section 28-12-505(2)[, Idaho Code]); or
- (b) Except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under the provisions of section 28-12-405[, Idaho Code], the lessee fails so to modify the lease agreement within a reasonable time not exceeding thirty (30) days, the lease contract lapses with respect to any deliveries affected.

History.

I.C., § 28-12-406, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-616(1) and (2).

Changes: Revised to reflect leasing practices and terminology. Note that subsection 1(a) allows the lessee under a lease, including a finance lease, the right to terminate the lease for excused performance (Sections 2A-404 and 2A-405). However, subsection 1(b), which allows the lessee the right to modify the lease for excused performance, excludes a finance lease that is not a consumer lease. This exclusion is compelled by the same policy that led to codification of provisions with

respect to irrevocable promises. Section 2A-407.

Definitional Cross References: “Consumer lease”. Section 2A-103(1)(e).

“Delivery”. Section 1-201(14).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Installment lease contract”. Section 2A-103(1)(i).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notice”. Section 1-201(25).
 “Reasonable time”. Section 1-204 [1-205] (1)
 and (2).
 “Receipt”. Section 2-103(1)(c).

“Rights”. Section 1-201(36).
 “Termination”. Section 2A-103(1)(z).
 “Value”. Section 1-201(44) [now 1-204].
 “Written”. Section 1-201(46).

28-12-407. Irrevocable promises — Finance leases. — (1) In the case of a finance lease that is not a consumer lease the lessee’s promises under the lease contract become irrevocable and independent upon the lessee’s acceptance of the goods.

(2) A promise that has become irrevocable and independent under the provisions of subsection (1) of this section:

- (a) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and
- (b) Is not subject to cancellation, termination, modification, repudiation, excuse or substitution without the consent of the party to whom the promise runs.

(3) The provisions of this section do not affect the validity under any other law of a covenant in any lease contract making the lessee’s promises irrevocable and independent upon the lessee’s acceptance of the goods.

History.

I.C., § 28-12-407, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Purposes: 1. This section extends the benefits of the classic “hell or high water” clause to a finance lease that is not a consumer lease. This section is self-executing; no special provision need be added to the contract. This section makes covenants in a finance lease irrevocable and independent due to the function of the finance lessor in a three party relationship: the lessee is looking to the supplier to perform the essential covenants and warranties. Section 2A-209. Thus, upon the lessee’s acceptance of the goods the lessee’s promises to the lessor under the lease contract become irrevocable and independent. The provisions of this section remain subject to the obligation of good faith (Sections 2A-103(4) and 1-203), and the lessee’s revocation of acceptance (Section 2A-517).

2. The section requires the lessee to perform even if the lessor’s performance after the lessee’s acceptance is not in accordance with the lease contract; the lessee may, however, have and pursue a cause of action against the lessor, e.g., breach of certain limited warranties (Sections 2A-210 and 2A-211(1)). This is appropriate because the benefit of the supplier’s promises and warranties to the lessor under the supply contract and, in some cases, the warranty of a manufacturer who is not the supplier, is extended to the lessee under the finance lease. Section 2A-209. Despite this

balance, this section excludes a finance lease that is a consumer lease. That a consumer be obligated to pay notwithstanding defective goods or the like is a principle that is not tenable under case law (*Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967)), state statute (Unif. Consumer Credit Code §§ 3.403-405, 7A U.L.A. 126-31 (1974), or federal statute (15 U.S.C. § 1666i (1982))).

3. The relationship of the three parties to a transaction that qualifies as a finance lease is best demonstrated by a hypothetical. A, the potential lessor, has been contracted [contacted] by B, the potential lessee, to discuss the lease of an expensive line of equipment that B has recently placed an order for with C, the manufacturer of such goods. The negotiation is completed and A, as lessor, and B, as lessee, sign a lease of the line of equipment for a 60-month term. B, as buyer, assigns the purchase order with C to A. If this transaction creates a lease (Section 2A-103(1)(j)), this transaction should qualify as a finance lease. Section 2A-103(1)(g).

4. The line of equipment is delivered by C to B’s place of business. After installation by C and testing by B, B accepts the goods by signing a certificate of delivery and acceptance, a copy of which is sent by B to A and C. One year later the line of equipment malfunctions and B falls behind in its manufacturing schedule.

5. Under this Article, because the lease is a finance lease, no warranty of fitness or merchantability is extended by A to B. Sections 2A-212(1) and 2A-213. Absent an express provision in the lease agreement, application of Section 2A-210 or Section 2A-211(1), or application of the principles of law and equity, including the law with respect to fraud, duress, or the like (Sections 2A-103(4) and 1-103), B has no claim against A. B's obligation to pay rent to A continues as the obligation became irrevocable and independent when B accepted the line of equipment (Section 2A-407(1)). B has no right of set-off with respect to any part of the rent still due under the lease. Section 2A-508(6). However, B may have another remedy. Despite the lack of privity between B and C (the purchase order with C having been assigned by B to A), B may have a claim against C. Section 2A-209(1).

6. This section does not address whether a "hell or high water" clause, i.e., a clause that is to the effect of this section, is enforceable if included in a finance lease that is a consumer lease or a lease that is not a finance lease. That issue will continue to be determined by the facts of each case and other law which this

section does not affect. Sections 2A-104, 2A-103(4), 9-206 and 9-318. However, with respect to finance leases that are not consumer leases courts have enforced "hell or high water" clauses. *In re O.P.M. Leasing Servs.*, 21 Bankr. 993, 1006 (Bankr. S.D.N.Y. 1982).

7. Subsection (2) further provides that a promise that has become irrevocable and independent under subsection (1) is enforceable not only between the parties but also against third parties. Thus, the finance lease can be transferred or assigned without disturbing enforceability. Further, subsection (2) also provides that the promise cannot, among other things, be cancelled or terminated without the consent of the lessor.

Cross References: Sections 1-103, 1-203, 2A-103(1)(g), 2A-103(1)(j), 2A-103(4), 2A-104, 2A-209, 2A-209(1), 2A-210, 2A-211(1), 2A-212(1), 2A-213, 2A-517(1)(b), 9-206 and 9-318.

Definitional Cross References: "Cancellation". Section 2A-103(1)(b).

"Consumer lease". Section 2A-103(1)(e).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Party". Section 1-201(29).

"Termination". Section 2A-103(1)(z).

PART 5. DEFAULT

28-12-501. Default — Procedure. — (1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this chapter.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this chapter and, except as limited by this chapter, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with the provisions of this chapter.

(4) Except as otherwise provided in section 28-1-305(a)[, Idaho Code,] or this chapter or the lease agreement, the rights and remedies referred to in subsections (2) and (3) of this section are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case the provisions of this part do not apply.

History.

I.C., § 28-12-501, as added by 1993, ch.

287, § 1, p. 977; am. 2004, ch. 43, § 38, p. 136.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (4)

was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Former Section 9-501 (now codified as Section 9-601 through 9-604).

Changes: Substantially revised.

Purposes: 1. Subsection (1) is new and represents a departure from the Article on Secured Transactions (Article 9) as the subsection makes clear that whether a party to the lease agreement is in default is determined by this Article as well as the agreement. Sections 2A-508 and 2A-523. It further departs from Article 9 in recognizing the potential default of either party, a function of the bilateral nature of the obligations between the parties to the lease contract.

2. Subsection (2) is a version of the first sentence of Section 9-601(a), revised to reflect leasing terminology.

3. Subsection (3), an expansive version of the second sentence of Section 9-601(a), lists the procedures that may be followed by the party seeking enforcement; in effect, the scope of the procedures listed in subsection (3) is consistent with the scope of the procedures available to the foreclosing secured party.

4. Subsection (4) establishes that the parties' rights and remedies are cumulative. DeKoven, *Leases of Equipment*: Puritan Leasing Company v. August, A Dangerous Decision, 12 U. S.F. L. Rev. 257, 276-80 (1978). Cumulation, and largely unrestricted selection, of remedies is allowed in furtherance of the general policy of the Commercial Code, stated in Section 1-305, that remedies be

liberally administered to put the aggrieved party in as good a position as if the other party had fully performed. Therefore, cumulation of, or selection among, remedies is available to the extent necessary to put the aggrieved party in as good a position as it would have been in had there been full performance. However, cumulation of, or selection among, remedies is not available to the extent that the cumulation or selection would put the aggrieved party in a better position than it would have been in had there been full performance by the other party.

5. Section 9-602, which, among other things, states that certain rules, to the extent they give rights to the debtor and impose duties on the secured party, may not be waived or varied, is not incorporated in this Article. Given the significance of freedom of contract in the development of the common law as it applies to bailments for hire and the lessee's lack of an equity of redemption, there is no reason to impose that restraint.

Cross References: Sections 1-305, 2A-508, 2A-523, Article 9, especially Sections 9-601 and 9-602.

Definitional Cross References: "Goods". Section 2A-103(1)(h).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(b)(26).

"Remedy". Section 1-201(b)(32).

"Rights". Section 1-201(b)(34).

28-12-502. Notice after default. — Except as otherwise provided in this chapter or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement.

History.

I.C., § 28-12-502, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Purposes: This section makes clear that absent agreement to the contrary or provision in this Article to the contrary, e.g., Section 2A-516(3)(a), the party in default is not entitled to notice of default or enforcement. While a review of Part 5 of Article 9 leads to the

same conclusion with respect to giving notice of default to the debtor, it is never stated. Although Article 9 requires notice of disposition and strict foreclosure, the different scheme of lessors' and lessees' rights and remedies developed under the common law, and codified by this Article, generally does not

require notice of enforcement; furthermore, such notice is not mandated by due process requirements. However, certain sections of this Article do require notice. E.g., Section 2A-517(4).

Cross References: Sections 2A-516(3)(a), 2A-517(4), and Article 9, esp. Part 5.

Definitional Cross References: "Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

28-12-503. Modification or impairment of rights and remedies. —

(1) Except as otherwise provided in this chapter, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter.

(2) Resort to a remedy provided under this chapter or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this chapter.

(3) Consequential damages may be liquidated under section 28-12-504[, Idaho Code], or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration, or exclusion of damages where the loss is commercial is not prima facie unconscionable.

(4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this chapter.

History.

I.C., § 28-12-503, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (3)

was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-719 and 2-701.

Changes: Rewritten to reflect lease terminology and to clarify the relationship between this section and Section 2A-504.

Purposes: 1. A significant purpose of this Part is to provide rights and remedies for those parties to a lease who fail to provide them by agreement or whose rights and remedies fail of their essential purpose or are unenforceable. However, it is important to note that this implies no restriction on freedom to contract. Sections 2A-103(4) and 1-102(3). Thus, subsection (1), a revised version of the provisions of Section 2-719(1), allows the parties to the lease agreement

freedom to provide for rights and remedies in addition to or in substitution for those provided in this Article and to alter or limit the measure of damages recoverable under this Article. Except to the extent otherwise provided in this Article (e.g., Sections 2A-105, 106 and 108(1) and (2)), this Part shall be construed neither to restrict the parties' ability to provide for rights and remedies or to limit or alter the measure of damages by agreement, nor to imply disapproval of rights and remedy schemes other than those set forth in this Part.

2. Subsection (2) makes explicit with respect to this Article what is implicit in Section 2-719 with respect to the Article on Sales

(Article 2): if an exclusive remedy is held to be unconscionable, remedies under this Article are available. Section 2-719 official comment 1.

3. Subsection (3), a revision of Section 2-719(3), makes clear that consequential damages may also be liquidated. Section 2A-504(1).

4. Subsection (4) is a revision of the provisions of Section 2-701. This subsection leaves the treatment of default with respect to obligations or promises collateral or ancillary to the lease contract to other law. Sections 2A-103(4) and 1-103. An example of such an obligation would be that of the lessor to the secured creditor which has provided the funds to leverage the lessor's lease transaction; an example of such a promise would be that of

the lessee, as seller, to the lessor, as buyer, in a sale-leaseback transaction.

Cross References: Sections 1-102(3), 1-103, Article 2, especially Sections 2-701, 2-719, 2-719(1), 2-719(3), 2-719 official comment 1, and Sections 2A-103(4), 2A-105, 2A-106, 2A-108(1), 2A-108(2), and 2A-504.

Definitional Cross References: "Agreed". Section 1-201(3).

"Consumer goods". Section 9-109(1).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Person". Section 1-201(30).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

28-12-504. Liquidation of damages. — (1) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with the provisions of subsection (1) of this section, or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this chapter.

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (section 28-12-525 or 28-12-526[, Idaho Code]), the lessee is entitled to restitution of any amount by which the sum of his payments exceeds:

(a) The amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with the provisions of subsection (1) of this section; or

(b) In the absence of those terms, twenty percent (20%) of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or five hundred dollars (\$500).

(4) A lessee's right to restitution under the provisions of subsection (3) of this section is subject to offset to the extent the lessor establishes:

(a) A right to recover damages under the provisions of this chapter other than the provisions of subsection (1) of this section; and

(b) The amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

History.

I.C., § 28-12-504, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in the introductory paragraph in subsection (3) was added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-718(1), (2), (3) and 2-719(2).

Changes: Substantially rewritten.

Purposes: Many leasing transactions are predicated on the parties' ability to agree to an appropriate amount of damages or formula for damages in the event of default or other act or omission. The rule with respect to sales of goods (Section 2-718) may not be sufficiently flexible to accommodate this practice. Thus, consistent with the common law emphasis upon freedom to contract with respect to bailments for hire, this section has created a revised rule that allows greater flexibility with respect to leases of goods.

Subsection (1), a significantly modified version of the provisions of Section 2-718(1), provides for liquidation of damages in the lease agreement at an amount or by a formula. Section 2-718(1) does not by its express terms include liquidation by a formula; this change was compelled by modern leasing practice. Subsection (1), in a further expansion of Section 2-718(1), provides for liquidation of damages for default as well as any other act or omission.

A liquidated damages formula that is common in leasing practice provides that the sum of lease payments past due, accelerated future lease payments, and the lessor's estimated residual interest, less the net proceeds of disposition (whether by sale or re-lease) of the leased goods is the lessor's damages. Tax indemnities, costs, interest and attorney's fees are also added to determine the lessor's damages. Another common liquidated damages formula utilizes a periodic depreciation allocation as a credit to the aforesaid amount in mitigation of a lessor's damages. A third formula provides for a fixed number of periodic payments as a means of liquidating damages. Stipulated loss or stipulated damage schedules are also common. Whether these formulae are enforceable will be determined in the context of each case by applying a standard of reasonableness in light of the harm anticipated when the formula was agreed to. Whether the inclusion of these formulae will affect the classification of the transaction as a lease or a security interest is to be determined by the facts of each case. Section 1-201(37). E.g., *In re Noack*, 44 Bankr. 172, 174-75 (Bankr. E.D. Wis. 1984).

This section does not incorporate two other tests that under sales law determine enforceability of liquidated damages, i.e., difficulties of proof of loss and inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. The ability to liquidate damages is critical to modern leasing practice; given the parties' freedom to contract at common law, the policy behind retaining these two additional requirements here was thought to be outweighed. Further, given the expansion of subsection (1) to enable the parties to liquidate the amount payable with respect to an indemnity for loss or diminution of anticipated tax benefits resulted in another change: the last sentence of Section 2-718(1), providing that a term fixing unreasonably large liquidated damages is void as a penalty, was also not incorporated. The impact of local, state and federal tax laws on a leasing transaction can result in an amount payable with respect to the tax indemnity many times greater than the original purchase price of the goods. By deleting the reference to unreasonably large liquidated damages the parties are free to negotiate a formula, restrained by the rule of reasonableness in this section. These changes should invite the parties to liquidate damages. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 Yale L.J. 199, 278 (1963).

Subsection (2), a revised version of Section 2-719(2), provides that if the liquidated damages provision is not enforceable or fails of its essential purpose, remedy may be had as provided in this Article.

Subsection (3)(b) of this section differs from subsection (2)(b) of Section 2-718; in the absence of a valid liquidated damages amount or formula the lessor is permitted to retain 20 percent of the present value of the total rent payable under the lease. The alternative limitation of \$500 contained in Section 2-718 is deleted as unrealistically low with respect to a lease other than a consumer lease.

Cross References: Sections 1-201(37), 2-718, 2-718(1), 2-718(2)(b) and 2-719(2).

Definitional Cross References: "Consumer lease". Section 2A-103(1)(e).

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Insolvent". Section 1-201(23).

“Lease agreement”. Section 2A-103(1)(k).
 “Lease contract”. Section 2A-103(1)(l).
 “Lessee”. Section 2A-103(1)(n).
 “Lessor”. Section 2A-103(1)(p).
 “Lessor’s residual interest”. Section 2A-103(1)(q).

“Party”. Section 1-201(29).
 “Present value”. Section 2A-103(1)(u).
 “Remedy”. Section 1-201(34).
 “Rights”. Section 1-201(36).
 “Term”. Section 1-201(42).
 “Value”. Section 1-201(44) [now 1-204].

28-12-505. Cancellation and termination and effect of cancellation, termination, rescission or fraud on rights and remedies. —

(1) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the cancelling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(2) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.

(3) Unless the contrary intention clearly appears, expressions of “cancellation,” “rescission,” or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

(4) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this chapter for default.

(5) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

History.

I.C., § 28-12-505, as added by 1993, ch. 287, § 1, p. 977.

JUDICIAL DECISIONS

Fraud.

Lessee has no claim of fraud in the inducement under the Uniform Commercial Code, where any misrepresentation by the dealer

regarding the warranty did not substantially impair the value of the leased truck. *Mickelsen v. Broadway Ford, Inc.*, — Idaho —, 280 P.3d 176 (2012).

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-106(3) and (4), 2-720 and 2-721.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: “Cancellation”. Section 2A-103(1)(b).

“Goods”. Section 2A-103(1)(h).
 “Lease contract”. Section 2A-103(1)(l).
 “Party”. Section 1-201(29).
 “Remedy”. Section 1-201(34).
 “Rights”. Section 1-201(36).
 “Termination”. Section 2A-103(1)(z).

28-12-506. Statute of limitations. — (1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four (4) years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one (1) year.

(2) A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered

by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

(3) If an action commenced within the time limited by the provision of subsection (1) of this section is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) The provisions of this section do not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this chapter becomes effective.

History.

I.C., § 28-12-506, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-725.

Changes: Substantially rewritten.

Purposes: Subsection (1) does not incorporate the limitation found in Section 2-725(1) prohibiting the parties from extending the period of limitation. Breach of warranty and indemnity claims often arise in a lease transaction; with the passage of time such claims often diminish or are eliminated. To encourage the parties to commence litigation under these circumstances makes little sense.

Subsection (2) states two rules for determining when a cause of action accrues. With respect to default, the rule of Section 2-725(2)

is not incorporated in favor of a more liberal rule of the later of the date when the default occurs or when the act or omission on which it is based is or should have been discovered. With respect to indemnity, a similarly liberal rule is adopted.

Cross References: Sections 2-725(1) and 2-725(2).

Definitional Cross References: "Action". Section 1-201(1).

"Aggrieved party". Section 1-201(2).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Remedy". Section 1-201(34).

"Termination". Section 2A-103(1)(z).

28-12-507. Proof of market rent — Time and place. — (1) Damages based on market rent (section 28-12-519 or 28-12-528[, Idaho Code]) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in sections 28-12-519 and 28-12-528[, Idaho Code].

(2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this chapter is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.

(3) Evidence of a relevant rent prevailing at a time or place or for a lease

term other than the one described in this chapter offered by one (1) party is not admissible unless and until he has given the other party notice the court finds sufficient to prevent unfair surprise.

(4) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

History.

I.C., § 28-12-507, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsection (1) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-723 and 2-724.

Changes: Revised to reflect leasing practices and terminology. Sections 2A-519 and 2A-528 specify the times as of which market rent is to be determined.

Definitional Cross References: "Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

"Reasonable time". Section 1-204 [1-205] (1) and (2).

"Usage of trade". Section 1-205 [1-303].

"Value". Section 1-201(44) [now 1-204].

28-12-508. Lessee's remedies. — (1) If a lessor fails to deliver the goods in conformity to the lease contract (section 28-12-509[, Idaho Code]) or repudiates the lease contract (section 28-12-402[, Idaho Code]), or a lessee rightfully rejects the goods (section 28-12-509[, Idaho Code]) or justifiably revokes acceptance of the goods (section 28-12-517[, Idaho Code]), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 28-12-510[, Idaho Code]), the lessor is in default under the lease contract and the lessee may:

- (a) Cancel the lease contract (section 28-12-505(1)[, Idaho Code]);
- (b) Recover so much of the rent and security as has been paid and is just under the circumstances;
- (c) Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (sections 28-12-518 and 28-12-520[, Idaho Code]), or recover damages for nondelivery (sections 28-12-519 and 28-12-520[, Idaho Code]);
- (d) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

(a) If the goods have been identified, recover them (section 28-12-522[, Idaho Code]); or

(b) In a proper case, obtain specific performance or replevy the goods (section 28-12-521[, Idaho Code]).

(3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in section 28-12-519(3)[, Idaho Code].

(4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (section 28-12-519(4)[, Idaho Code]).

(5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to section 28-12-527(5)[, Idaho Code].

(6) Subject to the provisions of section 28-12-407[, Idaho Code], a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

History.

I.C., § 28-12-508, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-711 and 2-717.

Changes: Substantially rewritten.

Purposes: 1. This section is an index to Sections 2A-509 through 522 which set out the lessee's rights and remedies after the lessor's default. The lessor and the lessee can agree to modify the rights and remedies available under this Article; they can, among other things, provide that for defaults other than those specified in subsection (1) the lessee can exercise the rights and remedies referred to in subsection (1); and they can create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A-103(4) and 1-102(3).

2. Subsection (1), a substantially rewritten version of the provisions of Section 2-711(1), lists three cumulative remedies of the lessee where the lessor has failed to deliver conforming goods or has repudiated the contract, or the lessee has rightfully rejected or justifiably

revoked. Sections 2A-501(2) and (4). Subsection (1) also allows the lessee to exercise any contractual remedy. This Article rejects any general doctrine of election of remedy. To determine if one remedy bars another in a particular case is a function of whether the lessee has been put in as good a position as if the lessor had fully performed the lease agreement. Use of multiple remedies is barred only if the effect is to put the lessee in a better position than it would have been in had the lessor fully performed under the lease. Sections 2A-103(4), 2A-501(4), and 1-106(1). Subsection (1)(b), in recognition that no bright line can be created that would operate fairly in all installment lease cases and in recognition of the fact that a lessee may be able to cancel the lease (revoke acceptance of the goods) after the goods have been in use for some period of time, does not require that all lease payments made by the lessee under the lease be returned upon can-

cellation. Rather, only such portion as is just of the rent and security payments made may be recovered. If a defect in the goods is discovered immediately upon tender to the lessee and the goods are rejected immediately, then the lessee should recover all payments made. If, however, for example, a 36-month equipment lease is terminated in the 12th month because the lessor has materially breached the contract by failing to perform its maintenance obligations, it may be just to return only a small part or none of the rental payments already made.

3. Subsection (2), a version of the provisions of Section 2-711(2) revised to reflect leasing terminology, lists two alternative remedies for the recovery of the goods by the lessee; however, each of these remedies is cumulative with respect to those listed in subsection (1).

4. Subsection (3) is new. It covers defaults which do not deprive the lessee of the goods and which are not so serious as to justify rejection or revocation of acceptance under subsection (1). It also covers defaults for which the lessee could have rejected or revoked acceptance of the goods but elects not to do so and retains the goods. In either case, a lessee which retains the goods is entitled to recover damages as stated in Section 2A-519(3). That measure of damages is "the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's breach."

5. Subsection (1)(d) and subsection (3) recognize that the lease agreement may provide rights and remedies in addition to or different from those which Article 2A provides. In particular, subsection (3) provides that the lease agreement may give the remedy of cancellation of the lease for defaults by the lessor that would not otherwise be material defaults which would justify cancellation under subsection (1). If there is a right to cancel, there is, of course, a right to reject or revoke acceptance of the goods.

6. Subsection (4) is new and merely adds to the completeness of the index by including a reference to the lessee's recovery of damages upon the lessor's breach of warranty; such breach may not rise to the level of a default by the lessor justifying revocation of acceptance. If the lessee properly rejects or revokes acceptance of the goods because of a breach of warranty, the rights and remedies are those provided in subsection (1) rather than those in Section 2A-519(4).

7. Subsection (5), a revised version of the provisions of Section 2-711(3), recognizes, on rightful rejection or justifiable revocation, the lessee's security interest in goods in its possession and control. Section 9-113, which rec-

ognized security interests arising under the Article on Sales (Article 2), was amended with the adoption of this Article to reflect the security interests arising under this Article. Pursuant to Section 2A-511(4), a purchaser who purchases goods from the lessee in good faith takes free of any rights of the lessor, or in the case of a finance lease the supplier. Such goods, however, must have been rightfully rejected and disposed of pursuant to Section 2A-511 or 2A-512. However, Section 2A-517(5) provides that the lessee will have the same rights and duties with respect to goods where acceptance has been revoked as with respect to goods rejected. Thus, Section 2A-511(4) will apply to the lessee's disposition of such goods.

8. Pursuant to Section 2A-527(5), the lessee must account to the lessor for the excess proceeds of such disposition, after satisfaction of the claim secured by the lessee's security interest.

9. Subsection (6), a slightly revised version of the provisions of Section 2-717, sanctions a right of set-off by the lessee, subject to the rule of Section 2A-407 with respect to irrevocable promises in a finance lease that is not a consumer lease, and further subject to an enforceable "hell or high water" clause in the lease agreement. Section 2A-407 official comment. No attempt is made to state how the set-off should occur; this is to be determined by the facts of each case.

10. There is no special treatment of the finance lease in this section. Absent supplemental principles of law and equity to the contrary, in the case of most finance leases, following the lessee's acceptance of the goods the lessee will have no rights or remedies against the lessor, because the lessor's obligations to the lessee are minimal. Sections 2A-210 and 2A-211(1). Since the lessee will look to the supplier for performance, this is appropriate. Section 2A-209.

Cross References: Sections 1-102(3), 1-103, 1-106(1), Article 2, especially Sections 2-711, 2-717 and Sections 2A-103(4), 2A-209, 2A-210, 2A-211(1), 2A-407, 2A-501(2), 2A-501(4), 2A-509 through 2A-522, 2A-511(3), 2A-517(5), 2A-527(5) and Section 9-113.

Definitional Cross References: "Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Installment lease contract". Section 2A-103(1)(i).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notifies". Section 1-201(26).

"Receipt". Section 2-103(1)(c).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

"Value". Section 1-201(44) [now 1-204].

"Security interest". Section 1-201(37).

28-12-509. Lessee's rights on improper delivery — Rightful rejection. — (1) Subject to the provisions of section 28-12-510[, Idaho Code,] on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.

(2) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

History.

I.C., § 28-12-509, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (1)

was added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-601 and 2-602(1).

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Commercial unit". Section 2A-103(1)(c).

"Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Installment lease contract". Section 2A-103(1)(i).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notifies". Section 1-201(26).

"Reasonable time". Section 1-204 [1-205] (1) and (2).

"Rights". Section 1-201(36).

"Seasonably". Section 1-204 [1-205] (3).

28-12-510. Installment lease contracts — Rejection and default. — (1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within the provisions of subsection (2) of this section and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.

(2) Whenever nonconformity or default with respect to one (1) or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

History.

I.C., § 28-12-510, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-612.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: “Action”. Section 1-201(1).

“Aggrieved party”. Section 1-201(2).

“Cancellation”. Section 2A-103(1)(b).

“Conforming”. Section 2A-103(1)(d).

“Delivery”. Section 1-201(14).

“Installment lease contract”. Section 2A-103(1)(i).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notifies”. Section 1-201(26).

“Seasonably”. Section 1-204 [1-205] (3).

“Supplier”. Section 2A-103(1)(x).

“Value”. Section 1-201(44) [now 1-204].

28-12-511. Merchant lessee’s duties as to rightfully rejected goods. — (1) Subject to any security interest of a lessee (section 28-12-508(5)[, Idaho Code]), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor’s account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) If a merchant lessee (see subsection (1) of this section) or any other lessee (section 28-12-512[, Idaho Code]) disposes of goods, he is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding ten percent (10%) of the gross proceeds.

(3) In complying with the provisions of this section or section 28-12-512[, Idaho Code], the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(4) A purchaser who purchases in good faith from a lessee pursuant to the provisions of this section or section 28-12-512[, Idaho Code,] takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this chapter.

History.

I.C., § 28-12-511, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler’s Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-603 and 2-706(5).

Changes: Revised to reflect leasing practices and terminology. This section, by its

terms, applies to merchants as well as others. Thus, in construing the section it is important to note that under this Act the term good faith is defined differently for merchants (Section 2-103(1)(b)) than for others (Section 1-201(19)). Section 2A-103(3) and (4).

Definitional Cross References: "Action". Section 1-201(1).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Merchant lessee". Section 2A-103(1)(t).

"Purchaser". Section 1-201(33).

"Rights". Section 1-201(36).

"Security interest". Section 1-201(37).

"Supplier". Section 2A-103(1)(x).

"Value". Section 1-201(44) [now 1-204].

28-12-512. Lessee's duties as to rightfully rejected goods. —

(1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (section 28-12-511[, Idaho Code]) and subject to any security interest of a lessee (section 28-12-508(5)[, Idaho Code]):

(a) The lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(b) If the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in section 28-12-511[, Idaho Code]; but

(c) The lessee has no further obligations with regard to goods rightfully rejected.

(2) Action by the lessee pursuant to the provisions of subsection (1) of this section is not acceptance or conversion.

History.

I.C., § 28-12-512, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in the introductory paragraph in subsection (1) and in paragraph (1)(b) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-602(2)(b) and (c) and 2-604.

Changes: Substantially rewritten.

Purposes: The introduction to subsection (1) references goods that threaten to decline in value speedily and not perishables, the reference in Section 2-604, the statutory analogue. This is a change in style, not substance, as the first phrase includes the second. Subparagraphs (a) and (c) are revised versions of the provisions of Section 2-602(2)(b) and (c). Subparagraph (a) states the rule with respect to the lessee's treatment of goods in its possession following rejection; subparagraph (b)

states the rule regarding such goods if the lessor or supplier then fails to give instructions to the lessee. If the lessee performs in a fashion consistent with subparagraphs (a) and (b), subparagraph (c) exonerates the lessee.

Cross References: Sections 2-602(2)(b), 2-602(2)(c) and 2-604.

Definitional Cross References: "Action". Section 1-201(1).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notification". Section 1-201(26).

“Reasonable time”. Section 1-204 [1-205] (1) and (2).
 “Seasonably”. Section 1-204 [1-205] (3).

“Security interest”. Section 1-201(37).
 “Supplier”. Section 2A-103(1)(x).
 “Value”. Section 1-201(44) [now 1-204].

28-12-513. Cure by lessor of improper tender or delivery — Replacement. — (1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor’s or the supplier’s intention to cure and may then make a conforming delivery within the time provided in the lease contract.

(2) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he seasonably notifies the lessee.

History.

I.C., § 28-12-513, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-508.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: “Conforming”. Section 2A-103(1)(d).
 “Delivery”. Section 1-201(14).
 “Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).
 “Lessor”. Section 2A-103(1)(p).
 “Money”. Section 1-201(24).
 “Notifies”. Section 1-201(26).
 “Reasonable time”. Section 1-204 [1-205] (1) and (2).
 “Seasonably”. Section 1-204 [1-205] (3).
 “Supplier”. Section 2A-103(1)(x).

28-12-514. Waiver of lessee’s objections. — (1) In rejecting goods, a lessee’s failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

- (a) If, stated seasonably, the lessor or the supplier could have cured it (section 28-12-513[, Idaho Code]); or
- (b) Between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee’s failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent in the documents.

History.

I.C., § 28-12-514, as added by 1993, ch. 287, § 1, p. 977; am. 2004, ch. 42, § 16, p. 77.

STATUTORY NOTES

Compiler’s Notes.

The bracketed insertion in paragraph (1)(a)

was added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-605.

Changes: Revised to reflect leasing practices and terminology.

Purposes: The principles applicable to the commercial practice of payment against documents (subsection 2) are explained in official comment 4 to Section 2-605, the statutory analogue to this section.

Cross Reference: Section 2-605 official comment 4.

Definitional Cross References: "Between merchants". Section 2-104(3).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Rights". Section 1-201(36).

"Seasonably". Section 1-204 [1-205] (3).

"Supplier". Section 2A-103(1)(x).

"Writing". Section 1-201(46).

28-12-515. Acceptance of goods. — (1) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and:

- (a) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or
- (b) The lessee fails to make an effective rejection of the goods (section 28-12-509(2)[, Idaho Code]).

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

History.

I.C., § 28-12-515, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion at the end of paragraph (1)(b) was added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-606.

Changes: The provisions of Section 2-606(1)(a) were substantially rewritten to provide that the lessee's conduct may signify acceptance. Further, the provisions of Section 2-606(1)(c) were not incorporated as irrelevant given the lessee's possession and use of the leased goods.

Cross References: Sections 2-606(1)(a) and 2-606(1)(c).

Definitional Cross References: "Commercial unit". Section 2A-103(1)(c).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Supplier". Section 2A-103(1)(x).

28-12-516. Effect of acceptance of goods — Notice of default — Burden of establishing default after acceptance — Notice of claim or litigation to person answerable over. — (1) A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.

(2) A lessee's acceptance of goods precludes rejection of the goods ac-

cepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this chapter or the lease agreement for nonconformity.

(3) If a tender has been accepted:

(a) Within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier if any, or be barred from any remedy against the party not notified;

(b) Except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (section 28-12-211[, Idaho Code]) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(c) The burden is on the lessee to establish any default.

(4) If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over the following apply:

(a) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the person notified does not do so that person will be bound in any action against that person by the lessee by any determination of fact common to the two (2) litigations, then unless the person notified after seasonable receipt of the notice does come in and defend that person is so bound.

(b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (section 28-12-211[, Idaho Code]) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.

(5) The provisions of subsections (3) and (4) of this section apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (section 28-12-211[, Idaho Code]).

History.

I.C., § 28-12-516, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in paragraphs (3)(b) and (4)(b) and in subsection (5) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-607.

Changes: Substantially revised.

Purposes: 1. Subsection (2) creates a special rule for finance leases, precluding revocation if acceptance is made with knowledge of nonconformity with respect to the lease agreement, as opposed to the supply agreement; this is not inequitable as the lessee has a direct claim against the supplier. Section 2A-209(1). Revocation of acceptance of a finance lease is permitted if the lessee's acceptance was without discovery of the nonconformity (with respect to the lease agreement, not the supply agreement) and was reasonably induced by the lessor's assurances. Section 2A-517(1)(b). Absent exclusion or modification, the lessor under a finance lease makes certain warranties to the lessee. Sections 2A-210 and 2A-211(1). Revocation of acceptance is not prohibited even after the lessee's promise has become irrevocable and independent. Section 2A-407 official comment. Where the finance lease creates a security interest, the rule may be to the contrary. *General Elec. Credit Corp. of Tennessee v. Ger-Beck Mach. Co.*, 806 F.2d 1207 (3rd Cir. 1986).

2. Subsection (3)(a) requires the lessee to give notice of default, within a reasonable time after the lessee discovered or should have discovered the default. In a finance lease, notice may be given either to the supplier, the lessor, or both, but remedy is barred against the party not notified. In a finance lease, the lessor is usually not liable for defects in the goods and the essential notice is to the supplier. While notice to the finance lessor will often not give any additional rights to the lessee, it would be good practice to give the notice since the finance lessor has an interest in the goods. Subsection (3)(a) does not use the term finance lease, but the definition of supplier is a person from whom a lessor buys or leases goods to be leased under a finance lease. Section 2A-103(1)(x). Therefore, there can be a "supplier" only in a finance lease. Subsection (4) applies similar notice rules as

to lessors and suppliers if a lessee is sued for a breach of warranty or other obligation for which a lessor or supplier is answerable over.

3. Subsection (3)(b) requires the lessee to give the lessor notice of litigation for infringement or the like. There is an exception created in the case of a consumer lease. While such an exception was considered for a finance lease, it was not created because it was not necessary — the lessor in a finance lease does not give a warranty against infringement. Section 2A-211(2). Even though not required under subsection (3)(b), the lessee who takes under a finance lease should consider giving notice of litigation for infringement or the like to the supplier, because the lessee obtains the benefit of the suppliers' promises subject to the suppliers' defenses or claims. Sections 2A-209(1) and 2-607(3)(b).

Cross References: Sections 2-607(3)(b), 2A-103(1)(x), 2A-209(1), 2A-210, 2A-211(1), 2A-211(2), 2A-407 official comment and 2A-517(1)(b).

Definitional Cross References: "Action". Section 1-201(1).

"Agreement". Section 1-201(3).

"Burden of establishing". Section 1-201(8).

"Conforming". Section 2A-103(1)(d).

"Consumer lease". Section 2A-103(1)(e).

"Delivery". Section 1-201(14).

"Discovery". Section 1-201(25).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Knowledge". Section 1-201(25).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Notifies". Section 1-201(26).

"Person". Section 1-201(30).

"Reasonable time". Section 1-204 [1-205] (1) and (2).

"Receipt". Section 2-103(1)(c).

"Remedy". Section 1-201(34).

"Seasonably". Section 1-204 [1-205] (3).

"Supplier". Section 2A-103(1)(x).

"Written". Section 1-201(46).

28-12-517. Revocation of acceptance of goods. — (1) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if the lessee has accepted it:

(a) Except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(2) Except in the case of a finance lease that is not a consumer lease, a

lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.

(3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(4) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(5) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

History.

I.C., § 28-12-517, as added by 1993, ch. 287, § 1, p. 977.

JUDICIAL DECISIONS

Fraud.

Lessee has no claim of fraud in the inducement under the Uniform Commercial Code, where any misrepresentation by the dealer

regarding the warranty did not substantially impair the value of the leased truck. *Mickelsen v. Broadway Ford, Inc., — Idaho —*, 280 P.3d 176 (2012).

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-608.

Changes: Revised to reflect leasing practices and terminology. Note that in the case of a finance lease the lessee retains a limited right to revoke acceptance. Sections 2A-517(1)(b) and 2A-516 official comment. New subsections (2) and (3) added.

Purposes: 1. The section states the situations under which the lessee may return the goods to the lessor and cancel the lease. Subsection (2) recognizes that the lessor may have continuing obligations under the lease and that a default as to those obligations may be sufficiently material to justify revocation of acceptance of the leased items and cancellation of the lease by the lessee. For example, a failure by the lessor to fulfill its obligation to maintain leased equipment or to supply other goods which are necessary for the operation of the leased equipment may justify revocation of acceptance and cancellation of the lease.

2. Subsection (3) specifically provides that the lease agreement may provide that the

lessee can revoke acceptance for defaults by the lessor which in the absence of such an agreement might not be considered sufficiently serious to justify revocation. That is, the parties are free to contract on the question of what defaults are so material that the lessee can cancel the lease.

Cross Reference: Section 2A-516 official comment.

Definitional Cross References: “Commercial unit”. Section 2A-103(1)(c).

“Conforming”. Section 2A-103(1)(d).

“Discover”. Section 1-201(25).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Lot”. Section 2A-103(1)(s).

“Notifies”. Section 1-201(26).

“Reasonable time”. Section 1-204 [1-205] (1) and (2).

“Rights”. Section 1-201(36).

“Seasonably”. Section 1-204 [1-205] (3).

“Value”. Section 1-201(44) [now 1-204].

28-12-518. Cover — Substitute goods. — (1) After a default by a lessor under the lease contract of the type described in section 28-12-508(1)[, Idaho Code], or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 28-12-504[, Idaho Code]) or otherwise deter-

mined pursuant to agreement of the parties (sections 28-1-302 and 28-12-503[Idaho Code]), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under the provisions of subsection (2) of this section, or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and section 28-12-519[Idaho Code,] governs.

History.

I.C., § 28-12-518, as added by 1993, ch.

287, § 1, p. 977; am. 2004, ch. 43, § 39, p. 136.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

The words in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-712.

Changes: Substantially revised.

Purposes: 1. Subsection (1) allows the lessee to take action to fix its damages after default by the lessor. Such action may consist of the lease of goods. The decision to cover is a function of commercial judgment, not a statutory mandate replete with sanctions for failure to comply. Cf. Section 9-625.

2. Subsection (2) states a rule for determining the amount of lessee's damages provided that there is no agreement to the contrary. The lessee's damages will be established using the new lease agreement as a measure if the following three criteria are met: (i) the lessee's cover is by lease agreement, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such cover was effected in good faith, and in a commercially reasonable manner. Thus, the lessee will be entitled to recover from the lessor the present value, as of the date of commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period which is comparable to the then remaining term of the

original lease agreement less the present value of the rent reserved for the remaining term under the original lease, together with incidental or consequential damages less expenses saved in consequence of the lessor's default. Consequential damages may include loss suffered by the lessee because of deprivation of the use of the goods during the period between the default and the acquisition of the goods under the new lease agreement. If the lessee's cover does not satisfy the criteria of subsection (2), Section 2A-519 governs.

3. Two of the three criteria to be met by the lessee are familiar, but the concept of the new lease agreement being substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. Thus, the decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

4. While the section does not draw a bright line, it is possible to describe some of the

factors that should be considered in finding that a new lease agreement is substantially similar to the original. First, the goods subject to the new lease agreement should be examined. For example, in a lease of computer equipment the new lease might be for more modern equipment. However, it may be that at the time of the lessor's breach it was not possible to obtain the same type of goods in the market place. Because the lessee's remedy under Section 2A-519 is intended to place the lessee in essentially the same position as if he had covered, if goods similar to those to have been delivered under the original lease are not available, then the computer equipment in this hypothetical should qualify as a commercially reasonable substitute. See Section 2-712(1).

5. Second, the various elements of the new lease agreement should also be examined. Those elements include the presence or absence of options to purchase or release; the lessor's representations, warranties and covenants to the lessee, as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to adjust the difference in rental to take account of the difference between the two leases, find that the new lease is substantially similar to the old lease, and award cover damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from the rent due under the new lease before determining the difference in rental between the two leases.

6. Having examined the goods and the agreement, the test to be applied is whether, in light of these comparisons, the new lease agreement is substantially similar to the original lease agreement. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently with respect to the

goods and each element of the agreement, as it is important that a sense of commercial judgment pervade the finding. To establish the new lease as a proper measure of damage under subsection (2), these factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as both (a) the lease terms are commercially comparable (e.g., it is highly unlikely that a one-month rental and a five-year lease would reflect similar commercial realities), and (b) the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two-month lease of agricultural equipment for the months of August and September may be comparable to a two-month lease running from the 15th of August to the 15th of October if in the particular location two-month leases beginning on August 15th are basically interchangeable with two-month leases beginning August 1st. Similarly, the term of a one-year truck lease beginning on the 15th of January may be comparable to the term of a one-year truck lease beginning January 2d. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

Cross References: Sections 2-712(1), 2A-519 and 9-625.

Definitional Cross References: "Agreement". Section 1-201(b)(3).

"Contract". Section 1-201(b)(12).

"Good faith". Section 1-201(b)(20).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(b)(26).

"Present value". Section 2A-103(b)(28).

"Purchase". Section 2A-103(1)(v).

28-12-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods. —

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 28-12-504[, Idaho Code]) or otherwise determined pursuant to agreement of the parties (sections 28-1-302 and 28-12-503[, Idaho Code]), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under section 28-12-518(2)[, Idaho Code], or is by purchase or

otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (section 28-12-516(3)[, Idaho Code]), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

History.

I.C., § 28-12-519, as added by 1993, ch.

287, § 1, p. 977; am. 2004, ch. 43, § 40, p. 136.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (1) and (3) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-713 and 2-714.

Changes: Substantially revised.

Purposes: 1. Subsection (1), a revised version of the provisions of Section 2-713(1), states the basic rule governing the measure of lessee's damages for non-delivery or repudiation by the lessor or for rightful rejection or revocation of acceptance by the lessee. This measure will apply, absent agreement to the contrary, if the lessee does not cover or if the cover does not qualify under Section 2A-518. There is no sanction for cover that does not qualify.

2. The measure of damage is the present value, as of the date of default, of the market rent for the remaining term of the lease less the present value of the original rent for the

remaining term of the lease, plus incidental and consequential damages less expenses saved in consequence of the default. Note that the reference in Section 2A-519(1) is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, § 5-1, at 216-217 (1971). Section 2A-501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) and 1-103.

3. Subsection (2), a revised version of the

provisions of Section 2-713(2), states the rule with respect to determining market rent.

4. Subsection (3), a revised version of the provisions of Section 2-714(1) and (3), states the measure of damages where goods have been accepted and acceptance is not revoked. The subsection applies both to defaults which occur at the inception of the lease and to defaults which occur subsequently, such as failure to comply with an obligation to maintain the leased goods. The measure in essence is the loss, in the ordinary course of events, flowing from the default.

5. Subsection (4), a revised version of the provisions of Section 2-714(2), states the measure of damages for breach of warranty. The measure in essence is the present value of the difference between the value of the goods accepted and of the goods if they had been as warranted.

6. Subsections (1), (3) and (4) specifically state that the parties may by contract vary the damages rules stated in those subsections.

Cross References: Sections 2-713(1), 2-713(2), 2-714 and Section 2A-518.

Definitional Cross References: “Conforming”. Section 2A-103(1)(d).

“Delivery”. Section 1-201(b)(15).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease agreement”. Section 2A-103(1)(k).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notification”. Section 1-202.

“Present value”. Section 1-201(b)(28).

“Value”. Section 1-204.

28-12-520. Lessee’s incidental and consequential damages. —

(1) Incidental damages resulting from a lessor’s default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(2) Consequential damages resulting from a lessor’s default include:

(a) Any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

History.

I.C., § 28-12-520, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-715.

Changes: Revised to reflect leasing terminology and practices.

Purposes: Subsection (1), a revised version of the provisions of Section 2-715(1), lists some examples of incidental damages resulting from a lessor’s default; the list is not exhaustive. Subsection (1) makes clear that it applies not only to rightful rejection, but also to justifiable revocation.

Subsection (2), a revised version of the

provisions of Section 2-715(2), lists some examples of consequential damages resulting from a lessor’s default; the list is not exhaustive.

Cross References: Section 2-715.

Definitional Cross References: “Goods”. Section 2A-103(1)(h).

“Knows”. Section 1-201(25).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Person”. Section 1-201(30).

“Receipt”. Section 2-103(1)(c).

28-12-521. Lessee’s right to specific performance or replevin. —

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances.

(2) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.

(3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

History.

I.C., § 28-12-521, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-716.

Changes: Revised to reflect leasing practices and terminology, and to expand the reference to the right of replevin in subsection (3) to include other similar rights of the lessee.

Definitional Cross References: "Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Rights". Section 1-201(36).

"Term". Section 1-201(42).

28-12-522. Lessee's right to goods on lessor's insolvency. —

(1) Subject to the provisions of subsection (2) of this section and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (section 28-12-217[, Idaho Code]) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within ten (10) days after receipt of the first installment of rent and security.

(2) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

History.

I.C., § 28-12-522, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (1) was added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-502.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Conforming". Section 2A-103(1)(d).
"Goods". Section 2A-103(1)(h).

"Insolvent". Section 1-201(23).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Receipt". Section 2-103(1)(c).

"Rights". Section 1-201(36).

28-12-523. Lessor's remedies. — (1) If a lessee wrongfully rejects or

revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 28-12-510[, Idaho Code]), the lessee is in default under the lease contract and the lessor may:

- (a) Cancel the lease contract (section 28-12-505(1)[, Idaho Code]);
- (b) Proceed respecting goods not identified to the lease contract (section 28-12-524[, Idaho Code]);
- (c) Withhold delivery of the goods and take possession of goods previously delivered (section 28-12-525[, Idaho Code]);
- (d) Stop delivery of the goods by any bailee (section 28-12-526[, Idaho Code]);
- (e) Dispose of the goods and recover damages (section 28-12-527[, Idaho Code]), or retain the goods and recover damages (section 28-12-528[, Idaho Code]), or in a proper case recover rent (section 28-12-529[, Idaho Code]);
- (f) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under the provisions of subsection (1) of this section, the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default.

(3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:

- (a) If the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in subsection (1) or (2) of this section; or
- (b) If the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (2) of this section.

History.

I.C., § 28-12-523, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertions throughout subsection (1) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-703.

Changes: Substantially revised.

Purposes: 1. Subsection (1) is an index to

Sections 2A-524 through 2A-531 and states that the remedies provided in those sections are available for the defaults referred to in subsection (1): wrongful rejection or revocation of acceptance, failure to make a payment when due, or repudiation. In addition, remedies provided in the lease contract are available. Subsection (2) sets out a remedy if the lessor does not pursue to completion a right or actually obtain a remedy available under subsection (1), and subsection (3) sets out statutory remedies for defaults not specifically referred to in subsection (1). Subsection (3) provides that, if any default by the lessee other than those specifically referred to in subsection (1) is material, the lessor can exercise the remedies provided in subsection (1) or (2); otherwise the available remedy is as provided in subsection (3). A lessor who has brought an action seeking or has nonjudicially pursued one or more of the remedies available under subsection (1) may amend so as to claim or may nonjudicially pursue a remedy under subsection (2) unless the right or remedy first chosen has been pursued to an extent actually inconsistent with the new course of action. The intent of the provision is to reject the doctrine of election of remedies and to permit an alteration of course by the lessor unless such alteration would actually have an effect on the lessee that would be unreasonable under the circumstances. Further, the lessor may pursue remedies under both subsections (1) and (2) unless doing so would put the lessor in a better position than it would have been in had the lessee fully performed.

2. The lessor and the lessee can agree to modify the rights and remedies available under the Article; they can, among other things, provide that for defaults other than those specified in subsection (1) the lessor can exercise the rights and remedies referred to in subsection (1), whether or not the default would otherwise be held to substantially impair the value of the lease contract to the lessor; they can also create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A-103(4) and 1-102(3).

3. Subsection (1), a substantially rewritten version of Section 2-703, lists various cumulative remedies of the lessor where the lessee wrongfully rejects or revokes acceptance, fails to make a payment when due, or repudiates. Section 2A-501(2) and (4). The subsection also allows the lessor to exercise any contractual remedy.

4. This Article rejects any general doctrine of election of remedy. Whether, in a particular case, one remedy bars another, is a function of whether lessor has been put in as good a position as if the lessee had fully performed the lease contract. Multiple remedies are

barred only if the effect is to put the lessor in a better position than it would have been in had the lessee fully performed under the lease. Sections 2A-103(4), 2A-501(4), and 1-106(1).

5. Hypothetical: To better understand the application of subparagraphs (a) through (e), it is useful to review a hypothetical. Assume that A is a merchant in the business of selling and leasing new bicycles of various types. B is about to engage in the business of subleasing bicycles to summer residents of and visitors to an island resort. A, as lessor, has agreed to lease 60 bicycles to B. While there is one master lease, deliveries and terms are staggered. 20 bicycles are to be delivered by A to B's island location on June 1; the term of the lease of these bicycles is four months. 20 bicycles are to be delivered by A to B's island location on July 1; the term of the lease of these bicycles is three months. Finally, 20 bicycles are to be delivered by A to B's island location on August 1; the term of the lease of these bicycles is two months. B is obligated to pay rent to A on the 15th day of each month during the term for the lease. Rent is \$50 per month, per bicycle. B has no option to purchase or release and must return the bicycles to A at the end of the term, in good condition, reasonable wear and tear excepted. Since the retail price of each bicycle is \$400 and bicycles used in the retail rental business have a useful economic life of 36 months, this transaction creates a lease. Sections 2A-103(1)(j) and 1-201(37).

6. A's current inventory of bicycles is not large. Thus, upon signing the lease with B in February, A agreed to purchase 60 new bicycles from A's principal manufacturer, with special instructions to drop ship the bicycles to B's island location in accordance with the delivery schedule set forth in the lease.

7. The first shipment of 20 bicycles was received by B on May 21. B inspected the bicycles, accepted the same as conforming to the lease and signed a receipt of delivery and acceptance. However, due to poor weather that summer, business was terrible and B was unable to pay the rent due on June 15. Pursuant to the lease A sent B notice of default and proceeded to enforce his rights and remedies against B.

8. A's counsel first advised A that under Section 2A-510(2) and the terms of the lease B's failure to pay was a default with respect to the whole. Thus, to minimize A's continued exposure, A was advised to take possession of the bicycles. If A had possession of the goods A could refuse to deliver. Section 2A-525(1). However, the facts here are different. With respect to the bicycles in B's possession, A has the right to take possession of the bicycles, without breach of the peace. Section 2A-525(2). If B refuses to allow A access to the

bicycles, A can proceed by action, including replevin or injunctive relief.

9. With respect to the 40 bicycles that have not been delivered, this Article provides various alternatives. First, assume that 20 of the remaining 40 bicycles have been manufactured and delivered by the manufacturer to a carrier for shipment to B. Given the size of the shipment, the carrier was using a small truck for the delivery and the truck had not yet reached the island ferry when the manufacturer (at the request of A) instructed the carrier to divert the shipment to A's place of business. A's right to stop delivery is recognized under these circumstances. Section 2A-526(1). Second, assume that the 20 remaining bicycles were in the process of manufacture when B defaulted. A retains the right (as between A as lessor and B as lessee) to exercise reasonable commercial judgment whether to complete manufacture or to dispose of the unfinished goods for scrap. Since A is not the manufacturer and A has a binding contract to buy the bicycles, A elected to allow the manufacturer to complete the manufacture of the bicycles, but instructed the manufacturer to deliver the completed bicycles to A's place of business. Section 2A-524(2).

10. Thus, so far A has elected to exercise the remedies referred to in subparagraphs (b) through (d) in subsection (1). None of these remedies bars any of the others because A's election and enforcement merely resulted in A's possession of the bicycles. Had B performed A would have recovered possession of the bicycles. Thus A is in the process of obtaining the benefit of his bargain. Note that A could exercise any other rights or pursue any other remedies provided in the lease contract (Section 2A-523(1)(f)), or elect to recover his loss due to the lessee's default under Section 2A-523(2).

11. A's counsel next would determine what action, if any, should be taken with respect to the goods. As stated in subparagraph (e) and as discussed fully in Section 2A-527(1) the lessor may, but has no obligation to, dispose of the goods by a substantially similar lease (indeed, the lessor has no obligation whatsoever to dispose of the goods at all) and recover damages based on that action, but lessor will not be able to recover damages which put it in a better position than performance would have done, nor will it be able to recover damages for losses which it could have reasonably avoided. In this case, since A is in the business of leasing and selling bicycles, A will probably inventory the 60 bicycles for its retail trade.

12. A's counsel then will determine which of the various means of ascertaining A's damages against B are available. Subparagraph (e) catalogues each relevant section. First, under Section 2A-527(2) the amount of A's

claim is computed by comparing the original lease between A and B with any subsequent lease of the bicycles but only if the subsequent lease is substantially similar to the original lease contract. While the section does not define this term, the official comment does establish some parameters. If, however, A elects to lease the bicycles to his retail trade, it is unlikely that the resulting lease will be substantially similar to the original, as leases to retail customers are considerably different from leases to wholesale customers like B. If, however, the leases were substantially similar, the damage claim is for accrued and unpaid rent to the beginning of the new lease, plus the present value as of the same date, of the rent reserved under the original lease for the balance of its term less the present value as of the same date of the rent reserved under the replacement lease for a term comparable to the balance of the term of the original lease, together with incidental damages less expenses saved in consequence of the lessee's default.

13. If the new lease is not substantially similar or if A elects to sell the bicycles or to hold the bicycles, damages are computed under Section 2A-528 or 2A-529.

14. If A elects to pursue his claim under Section 2A-528(1) the damage rule is the same as that stated in Section 2A-527(2) except that damages are measured from default if the lessee never took possession of the goods or from the time when the lessor did or could have regained possession and that the standard of comparison is not the rent reserved under a substantially similar lease entered into by the lessor but a market rent, as defined in Section 2A-507. Further, if the facts of this hypothetical were more elaborate A may be able to establish that the measure of damage under subsection (1) is inadequate to put him in the same position that B's performance would have, in which case A can claim the present value of his lost profits.

15. Yet another alternative for computing A's damage claim against B which will be available in some situations is recovery of the present value, as of entry of judgment, of the rent for the then remaining lease term under Section 2A-529. However, this formulation is not available if the goods have been repossessed or tendered back to A. For the 20 bicycles repossessed and the remaining 40 bicycles, A will be able to recover the present value of the rent only if A is unable to dispose of them, or circumstances indicate the effort will be unavailing. If A has prevailed in an action for the rent, at any time up to collection of a judgment by A against B, A might dispose of the bicycles. In such case A's claim for damages against B is governed by Section 2A-527 or 2A-528. Section 2A-529(3). The resulting recalculation of claim should reduce

the amount recoverable by A against B and the lessor is required to cause an appropriate credit to be entered against the earlier judgment. However, the nature of the post-judgment proceedings to resolve this issue, and the sanctions for a failure to comply, if any, will be determined by other law.

16. Finally, if the lease agreement had so provided pursuant to subparagraph (f), A's claim against B would not be determined under any of these statutory formulae, but pursuant to a liquidated damages clause. Section 2A-504(1).

17. These various methods of computing A's damage claim against B are alternatives subject to Section 2A-501(4). However, the pursuit of any one of these alternatives is not a bar to, nor has it been barred by, A's earlier action to obtain possession of the 60 bicycles. These formulae, which vary as a function of an overt or implied mitigation of damage theory, focus on allowing A a recovery of the benefit of his bargain with B. Had B performed, A would have received the rent as well as the return of the 60 bicycles at the end of the term.

18. Finally, A's counsel should also advise A of his right to cancel the lease contract under subparagraph (a). Section 2A-505(1). Cancellation will discharge all existing obligations but preserve A's rights and remedies.

19. Subsection (2) recognizes that a lessor who is entitled to exercise the rights or to obtain a remedy granted by subsection (1) may choose not to do so. In such cases, the lessor can recover damages as provided in subsection (2). For example, for non-payment of rent, the lessor may decide not to take possession of the goods and cancel the lease, but rather to merely sue for the unpaid rent as it comes due plus lost interest or other damages "determined in any reasonable manner." Subsection (2) also negates any loss of

alternative rights and remedies by reason of having invoked or commenced the exercise or pursuit of any one or more rights or remedies.

20. Subsection (3) allows the lessor access to a remedy scheme provided in this Article as well as that contained in the lease contract if the lessee is in default for reasons other than those stated in subsection (1). Note that the reference to this Article includes supplementary principles of law and equity, e.g., fraud, misrepresentation and duress. Sections 2A-103(4) and 1-103.

21. There is no special treatment of the finance lease in this section. Absent supplementary principles of law to the contrary, in most cases the supplier will have no rights or remedies against the defaulting lessee. Section 2A-209(2)(ii). Given that the supplier will look to the lessor for payment, this is appropriate. However, there is a specific exception to this rule with respect to the right to identify goods to the lease contract. Section 2A-524(2). The parties are free to create a different result in a particular case. Sections 2A-103(4) and 1-102(3).

Cross References: Sections 1-102(3), 1-103, 1-106(1), 1-201(37), 2-703, 2A-103(1)(j), 2A-103(4), 2A-209(2)(ii), 2A-501(4), 2A-504(1), 2A-505(1), 2A-507, 2A-510(2), 2A-524 through 2A-531, 2A-524(2), 2A-525(1), 2A-525(2), 2A-526(1), 2A-527(1), 2A-527(2), 2A-528(1) and 2A-529(3).

Definitional Cross References: "Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Installment lease contract". Section 2A-103(1)(i).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

"Value". Section 1-201(44) [now 1-204].

28-12-524. Lessor's right to identify goods to lease contract. —

(1) After default by the lessee under the lease contract of the type described in section 28-12-523(1) or section 28-12-523(3)(a)[, Idaho Code,] or, if agreed, after other default by the lessee, the lessor may:

(a) Identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

(b) Dispose of goods (section 28-12-527(1)[, Idaho Code]) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(2) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and

lease, sell or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

History.

I.C., § 28-12-524, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in the introductory paragraph in subsection (1) and in paragraph (1)(b) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-704.

Changes: Revised to reflect leasing practices and terminology.

Purposes: The remedies provided by this section are available to the lessor (i) if there has been a default by the lessee which falls within Section 2A-523(1) or 2A-523(3)(a), or (ii) if there has been any other default for which the lease contract gives the lessor the remedies provided by this section. Under "(ii)", the lease contract may give the lessor the remedies of identification and disposition provided by this section in various ways. For example, a lease provision might specifically refer to the remedies of identification and

disposition, or it might refer to this section by number (i.e., 2A-524), or it might do so by a more general reference such as "all rights and remedies provided by Article 2A for default by the lessee."

Definitional Cross References: "Aggrieved party". Section 1-201(2).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Learn". Section 1-201(25).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessor". Section 2A-103(1)(p).

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x).

"Value". Section 1-201(44) [now 1-204].

28-12-525. Lessor's right to possession of goods. — (1) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(2) After a default by the lessee under the lease contract of the type described in section 28-12-523(1) or 28-12-523(3)(a)[, Idaho Code,] or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (section 28-12-527[, Idaho Code]).

(3) The lessor may proceed under the provisions of subsection (2) of this section without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

History.

I.C., § 28-12-525, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsection (2) were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Sections 2-702(1) and 9-503.

Changes: Substantially revised.

Purposes:

1. Subsection (1), a revised version of the provisions of Section 2-702(1), allows the lessor to refuse to deliver goods if the lessee is insolvent. Note that the provisions of Section 2-702(2), granting the unpaid seller certain rights of reclamation, were not incorporated in this section. Subsection (2) made this unnecessary.

2. Subsection (2), a revised version of the provisions of Section 9-503, allows the lessor, on a Section 2A-523(1) or 2A-523(3)(a) default by the lessee, the right to take possession of or reclaim the goods. Also, the lessor can contract for the right to take possession of the goods for other defaults by the lessee. Therefore, since the lessee's insolvency is an event of default in a standard lease agreement, subsection (2) is the functional equivalent of Section 2-702(2). Further, subsection (2) sanctions the classic crate and delivery clause obligating the lessee to assemble the goods and to make them available to the lessor. Finally, the lessor may leave the goods in place, render them unusable (if they are goods employed in trade or business), and dispose of them on the lessee's premises.

3. Subsection (3), a revised version of the provisions of Section 9-503, allows the lessor to proceed under subsection (2) without judicial process, absent breach of the peace, or by

action. Sections 2A-501(3), 2A-103(4) and 1-201(1). In the appropriate case action includes injunctive relief. *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54 (5th Cir. 1970), cert. denied, 402 U.S. 909 (1971). This Section, as well as a number of other Sections in this Part, are included in the Article to codify the lessor's common law right to protect the lessor's reversionary interest in the goods. Section 2A-103(1)(q). These Sections are intended to supplement and not displace principles of law and equity with respect to the protection of such interest. Sections 2A-103(4) and 1-103. Such principles apply in many instances, e.g., loss or damage to goods if risk of loss passes to the lessee, failure of the lessee to return goods to the lessor in the condition stipulated in the lease, and refusal of the lessee to return goods to the lessor after termination or cancellation of the lease. See also Section 2A-532.

Cross References: Sections 1-106(2), 2-702(1), 2-702(2), 2A-103(4), 2A-501(3), 2A-532 and 9-503.

Definitional Cross References: "Action". Section 1-201(1).

"Delivery". Section 1-201(14).

"Discover". Section 1-201(25).

"Goods". Section 2A-103(1)(h).

"Insolvent". Section 1-201(23).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

"Rights". Section 1-201(36).

28-12-526. Lessor's stoppage of delivery in transit or otherwise.

— (1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under the provisions of subsection (1) of this section, the lessor may stop delivery until:

(a) Receipt of the goods by the lessee;

(b) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

(c) Such an acknowledgment to the lessee by a carrier via reshipment or as a warehouse.

(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

History.

I.C., § 28-12-526, as added by 1993, ch. 287, § 1, p. 977; am. 2004, ch. 42, § 17, p. 77.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-705.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: “Bill of lading”. Section 1-201(6).

“Delivery”. Section 1-201(14).

“Discover”. Section 1-201(25).

“Goods”. Section 2A-103(1)(h).

“Insolvent”. Section 1-201(23).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notifies” and “Notification”. Section 1-201(26).

“Person”. Section 1-201(30).

“Receipt”. Section 2-103(1)(c).

“Remedy”. Section 1-201(34).

“Rights”. Section 1-201(36).

28-12-527. Lessor’s rights to dispose of goods. — (1) After a default by a lessee under the lease contract of the type described in section 28-12-523(1) or 28-12-523(3)(a)[, Idaho Code,] or after the lessor refuses to deliver or takes possession of goods (section 28-12-525 or 28-12-526[, Idaho Code]), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 28-12-504[, Idaho Code]) or otherwise determined pursuant to agreement of the parties (sections 28-1-302 and 28-12-503[, Idaho Code]), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under section 28-12-530[, Idaho Code], less expenses saved in consequence of the lessee’s default.

(3) If the lessor’s disposition is by lease agreement that for any reason does not qualify for treatment under the provisions of subsection (2) of this section, or is by sale or otherwise, the lessor may recover from the lessee as

if the lessor had elected not to dispose of the goods and section 28-12-528 [Idaho Code,] governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under the provisions of this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this chapter.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (section 28-12-508(5)[Idaho Code]).

History.

I.C., § 28-12-527, as added by 1993, ch.

287, § 1, p. 977; am. 2004, ch. 43, § 41, p. 136.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-706(1), (5) and (6).

Changes: Substantially revised.

Purposes: 1. Subsection (1), a revised version of the first sentence of subsection 2-706(1), allows the lessor the right to dispose of goods after a statutory or other material default by the lessee (even if the goods remain in the lessee's possession — Section 2A-525(2)), after the lessor refuses to deliver or takes possession of the goods, or, if agreed, after other contractual default. The lessor's decision to exercise this right is a function of a commercial judgment, not a statutory mandate replete with sanctions for failure to comply. Cf. Section 9-625. As the owner of the goods, in the case of a lessor, or as the prime lessee of the goods, in the case of a sublessor, compulsory disposition of the goods is inconsistent with the nature of the interest held by the lessor or the sublessor and is not necessary because the interest held by the lessee or the sublessee is not protected by a right of redemption under the common law or this Article. Subsection 2A-527(5).

2. The rule for determining the measure of damages recoverable by the lessor against the lessee is a function of several variables. If the lessor has elected to effect disposition under subsection (1) and such disposition is by lease that qualifies under subsection (2), the measure of damages set forth in subsection (2) will apply, absent agreement to the contrary. Sections 2A-504, 2A-103(4) and 1-302.

3. The lessor's damages will be established using the new lease agreement as a measure

if the following three criteria are satisfied: (i) the lessor disposed of the goods by lease, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such disposition was in good faith, and in a commercially reasonable manner. Thus, the lessor will be entitled to recover from the lessee the accrued and unpaid rent as of the date of commencement of the term of the new lease, and the present value, as of the same date of the rent under the original lease for the then remaining term less the present value as of the same date of the rent under the new lease agreement applicable to the period of the new lease comparable to the remaining term under the original lease, together with incidental damages less expenses saved in consequence of the lessee's default. If the lessor's disposition does not satisfy the criteria of subsection (2), the lessor may calculate its claim against the lessee pursuant to Section 2A-528. Section 2A-523(1)(e).

4. Two of the three criteria to be met by the lessor are familiar, but the concept of the new lease agreement that is substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. The decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

5. While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in a finding that a new lease agreement is substantially similar to the original. The various elements of the new lease agreement should be examined. Those elements include the options to purchase or release; the lessor's representations, warranties and covenants to the lessee as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently, as it is important that a sense of commercial judgment pervade the finding. See Section 2A-507(2). To establish the new lease as a proper measure of damage under subsection (2), these various factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to find that the new lease is substantially similar to the old lease, adjust the difference in the rent between the two leases to take account of the differences, and award damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from rent due under the new lease before the difference in rental between the two leases is determined.

6. The following hypothetical illustrates the difficulty of providing a bright line. Assume that A buys a jumbo tractor for \$1 million and then leases the tractor to B for a term of 36 months. The tractor is delivered to and is accepted by B on May 1. On June 1 B fails to pay the monthly rent to A. B returns the tractor to A, who immediately releases the tractor to C for a term identical to the term remaining under the lease between A and B. All terms and conditions under the lease between A and C are identical to those under the original lease between A and B, except that C does not provide any property damage or other insurance coverage, and B agreed to provide complete coverage. Coverage is expensive and difficult to obtain. It is a question of fact whether it is so difficult to adjust the recovery to take account of the difference between the two leases as to insurance that the second lease is not substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term

extends beyond the remaining term of the original lease, so long as both (a) the lease terms are commercially comparable (e.g., it is highly unlikely that a one-month rental and a five-year lease would reflect similar realities), and (b) the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the remaining term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two-month lease of agricultural equipment for the months of August and September may be comparable to a two-month lease running from the 15th of August to the 15th of October if in the particular location two-month leases beginning on August 15th are basically interchangeable with two-month leases beginning August 1st. Similarly, the term of a one-year truck lease beginning on the 15th of January may be comparable to the term of a one-year truck lease beginning January 2nd. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

8. Subsection (3), which is new, provides that if the lessor's disposition is by lease that does not qualify under subsection (2), or is by sale or otherwise, Section 2A-528 governs.

9. Subsection (4), a revised version of subsection 2-706(5), applies to protect a subsequent buyer or lessee who buys or leases from the lessor in good faith and for value, pursuant to disposition under this section. Note that by its terms, the rule in subsection 2A-304(1), which provides that the subsequent lessee takes subject to the original lease contract, is controlled by the rule stated in this subsection.

10. Subsection (5), a revised version of subsection 2-706(6), provides that the lessor is not accountable to the lessee for any profit made by the lessor on a disposition. This rule follows from the fundamental premise of the bailment for hire that the lessee under a lease of goods has no equity of redemption to protect.

Cross References: Sections 1-302, 2-706(1), 2-706(5), 2-706(6), 2A-103(4), 2A-304(1), 2A-504, 2A-507(2), 2A-523(1)(e), 2A-525(2), 2A-517(5), 2A-528 and 9-625.

Definitional Cross References: "Buyer" and "Buying". Section 2-103(1)(a).

"Delivery". Section 1-201(b)(15).

"Good faith". Section 1-201(b)(20).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

“Present value”. Section 1-201(b)(28).
“Rights”. Section 1-201(b)(34).
“Sale”. Section 2-106(1).

“Security interest”. Sections 1-201(b)(35)
and 1-203.
“Value”. Section 1-204.

28-12-528. Lessor’s damages for nonacceptance, failure to pay, repudiation, or other default. — (1) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 28-12-504[, Idaho Code]) or otherwise determined pursuant to agreement of the parties (sections 28-1-302 and 28-12-503[, Idaho Code]), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under section 28-12-527(2)[, Idaho Code], or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in section 28-12-523(1) or 28-12-523(3)(a)[, Idaho Code], or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of this subsection, of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under section 28-12-530[, Idaho Code], less expenses saved in consequence of the lessee’s default.

(2) If the measure of damages provided in subsection (1) of this section is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under section 28-12-530[, Idaho Code], due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

History. 287, § 1, p. 977; am. 2004, ch. 43, § 42, p. 136.
I.C., § 28-12-528, as added by 1993, ch.

STATUTORY NOTES

Compiler’s Notes. The words enclosed in parentheses so appeared in the law as enacted.
The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-708.
Changes: Substantially revised.
Purposes: 1. Subsection (1), a substantially revised version of Section 2-708(1), states the basic rule governing the measure of lessor’s damages for a default described in Section 2A-523(1) or (3)(a), and, if agreed, for a contractual default. This measure will apply if the lessor elects to retain the goods (whether undelivered, returned by the lessee, or repossessed by the lessor after acceptance and default by the lessee) or if the lessor’s disposition does not qualify under subsection 2A-527(2). Section 2A-527(3). Note that under some of these conditions, the lessor may recover damages from the lessee pursuant to the rule set forth in Section 2A-529. There is

no sanction for disposition that does not qualify under subsection 2A-527(2). Application of the rule set forth in this section is subject to agreement to the contrary. Sections 2A-504, 2A-103(4) and 1-302.

2. If the lessee has never taken possession of the goods, the measure of damage is the accrued and unpaid rent as of the date of default together with the present value, as of the date of default, of the original rent for the remaining term of the lease less the present value as of the same date of market rent, and incidental damages, less expenses saved in consequence of the default. Note that the reference in Section 2A-528(1)(i) and (ii) is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, *Commentaries on Indentures*, § 5-1, at 216-217 (1971). Section 2A-501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) and 1-103. If the lessee has taken possession of the goods, the measure of damages is the accrued and unpaid rent as of the earlier of the time the lessor repossesses the goods or the time the lessee tenders the goods to the lessor plus the difference between the present value, as of the same time, of the rent under the lease for the remaining lease term and the present value, as of the same time, of the market rent.

3. Market rent will be computed pursuant to Section 2A-507.

4. Subsection (2), a somewhat revised version of the provisions of subsection 2-708(2),

states a measure of damages which applies if the measure of damages in subsection (1) is inadequate to put the lessor in as good a position as performance would have. The measure of damage is the lessor's profit, including overhead, together with incidental damages, with allowance for costs reasonably incurred and credit for payments or proceeds of disposition. In determining the amount of due credit with respect to proceeds of disposition a proper value should be attributed to the lessor's residual interest in the goods. Sections 2A-103(1)(q) and 2A-507(4).

5. In calculating profit, a court should include any expected appreciation of the goods, e.g. the foal of a leased brood mare. Because this subsection is intended to give the lessor the benefit of the bargain, a court should consider any reasonable benefit or profit expected by the lessor from the performance of the lease agreement. See *Honeywell, Inc. v. Lithonia Lighting, Inc.*, 317 F. Supp. 406, 413 (N.D. Ga. 1970); *Locks v. Wade*, 36 N.J. Super. 128, 131, 114 A.2d 875, 877 (Super. Ct. App. Div. 1955). Further, in calculating profit the concept of present value must be given effect. *Taylor v. Commercial Credit Equip. Corp.*, 170 Ga. App. 322, 316 S.E.2d 788 (Ct. App. 1984). See generally Section 2A-103(1)(u).

Cross References: Sections 1-302, 2-708, 2A-103(1)(u), 2A-402, 2A-504, 2A-507, 2A-527(2) and 2A-529.

Definitional Cross References: "Agreement". Section 1-201(3).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(b)(26).

"Present value". Section 1-201(b)(28).

"Sale". Section 2-106(1).

28-12-529. Lessor's action for the rent. — (1) After default by the lessee under the lease contract of the type described in section 28-12-523(1) or 28-12-523(3)(a)[, Idaho Code,] or, if agreed, after other default by the lessee, if the lessor complies with the provisions of subsection (2) of this section, the lessor may recover from the lessee as damages:

(a) For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (section 28-12-219[, Idaho Code]), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under section 28-12-530[, Idaho Code], less expenses saved in consequence of the lessee's default; and

(b) For goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circum-

stances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under section 28-12-530[, Idaho Code], less expenses saved in consequence of the lessee's default.

(2) Except as provided in subsection (3) of this section, the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to the provisions of subsection (1) of this section. If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages is governed by section 28-12-527 or 28-12-528[, Idaho Code], and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to section 28-12-527 or 28-12-528[, Idaho Code].

(4) Payment of the judgment for damages obtained pursuant to the provisions of subsection (1) of this section entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term of and in accordance with the lease agreement.

(5) After default by the lessee under the lease contract of the type described in section 28-12-523(1) or section 28-12-523(3)(a)[, Idaho Code,] or, if agreed, after other default by the lessee, a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under section 28-12-527 or section 28-12-528[, Idaho Code].

History.

I.C., § 28-12-529, as added by 1993, ch. 287, § 1, p. 977.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions throughout this section were added by the compiler to conform to the statutory citation style.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-709.

Changes: Substantially revised.

Purposes: 1. Absent a lease contract provision to the contrary, an action for the full unpaid rent (discounted to present value as of the time of entry of judgment as to rent due after that time) is available as to goods not lost or damaged only if the lessee retains possession of the goods or the lessor is or apparently will be unable to dispose of them at a reasonable price after reasonable effort. There is no general right in a lessor to recover

the full rent from the lessee upon holding the goods for the lessee. If the lessee tenders goods back to the lessor, and the lessor refuses to accept the tender, the lessor will be limited to the damages it would have suffered had it taken back the goods. The rule in Article 2 that the seller can recover the price of accepted goods is rejected here. In a lease, the lessor always has a residual interest in the goods which the lessor usually realizes upon at the end of a lease term by either sale or a new lease. Therefore, it is not a substantial imposition on the lessor to require it to take

back and dispose of the goods if the lessee chooses to tender them back before the end of the lease term: the lessor will merely do earlier what it would have done anyway, sell or relet the goods. Further, the lessee will frequently encounter substantial difficulties if the lessee attempts to sublet the goods for the remainder of the lease term. In contrast to the buyer who owns the entire interest in goods and can easily dispose of them, the lessee is selling only the right to use the goods under the terms of the lease and the sublessee must assume a relationship with the lessor. In that situation, it is usually more efficient to eliminate the original lessee as a middleman by allowing the lessee to return the goods to the lessor who can then redispense of them.

2. In some situations even where possession of the goods is reacquired, a lessor will be able to recover as damages the present value of the full rent due, not under this section, but under 2A-528(2) which allows a lost profit recovery if necessary to put the lessor in the position it would have been in had the lessee performed. Following is an example of such a case. A is a lessor of construction equipment and maintains a substantial inventory. B leases from A a backhoe for a period of two weeks at a rental of \$1,000. After three days, B returns the backhoe and refuses to pay the rent. A has five backhoes in inventory, including the one returned by B. During the next 11 days after the return by B of the backhoe, A rents no more than three backhoes at any one time and, therefore, always has two on hand. If B had kept the backhoe for the full rental period, A would have earned the full rental on that backhoe, plus the rental on the other backhoes it actually did rent during that period. Getting this backhoe back before the end of the lease term did not enable A to make any leases it would not otherwise have made. The only way to put A in the position it would have been in had the lessee fully performed is to give the lessor the full rentals. A realized no savings at all because the backhoe was returned early and might even have incurred additional expense if it was paying for parking space for equipment in inventory. A has no obligation to relet the backhoe for the benefit of B rather than leasing the backhoe or any other in inventory for its own benefit. Further, it is probably not reasonable to expect A to dispose of the backhoe by sale when it is returned in an effort to reduce damages suffered by B. Ordinarily, the loss of a two-week rental would not require A to reduce the size of its backhoe inventory. Whether A would similarly be entitled to full rentals as lost profit in a one-year lease of a backhoe is a question of fact: in any event the lessor, subject to mitigation of damages rules, is entitled to be put in as good a position as it would have

been had the lessee fully performed the lease contract.

3. Under subsection (2) a lessor who is able and elects to sue for the rent due under a lease must hold goods not lost or damaged for the lessee. Subsection (3) creates an exception to the subsection (2) requirement. If the lessor disposes of those goods prior to collection of the judgment (whether as a matter of law or agreement), the lessor's recovery is governed by the measure of damages in Section 2A-527 if the disposition is by lease that is substantially similar to the original lease, or otherwise by the measure of damages in Section 2A-528. Section 2A-523 official comment.

4. Subsection (4), which is new, further reinforces the requisites of Subsection (2). In the event the judgment for damages obtained by the lessor against the lessee pursuant to subsection (1) is satisfied, the lessee regains the right to use and possession of the remaining goods for the balance of the original lease term; a partial satisfaction of the judgment creates no right in the lessee to use and possession of the goods.

5. The relationship between subsections (2) and (4) is important to understand. Subsection (2) requires the lessor to hold for the lessee identified goods in the lessor's possession. Absent agreement to the contrary, whether in the lease or otherwise, under most circumstances the requirement that the lessor hold the goods for the lessee for the term will mean that the lessor is not allowed to use them. Sections 2A-103(4) and 1-203. Further, the lessor's use of the goods could be viewed as a disposition of the goods that would bar the lessor from recovery under this section, remitting the lessor to the two preceding sections for a determination of the lessor's claim for damages against the lessee.

6. Subsection (5), the analogue of subsection 2-709(3), further reinforces the thrust of subsection (3) by stating that a lessor who is held not entitled to rent under this section has not elected a remedy; the lessor must be awarded damages under Sections 2A-527 and 2A-528. This is a function of two significant policies of this Article — that resort to a remedy is optional, unless expressly agreed to be exclusive (Section 2A-503(2)) and that rights and remedies provided in this Article generally are cumulative. (Section 2A-501(2) and (4)).

Cross References: Sections 1-203, 2-709, 2-709(3), 2A-103(4), 2A-501(2), 2A-501(4), 2A-503(2), 2A-504, 2A-523(1)(e), 2A-525(2), 2A-527, 2A-528 and 2A-529(2).

Definitional Cross References: "Action". Section 1-201(1).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Present value". Section 2A-103(1)(u).

"Reasonable time". Section 1-204 [1-205] (1) and (2).

28-12-530. Lessor's incidental damages. — Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

History.

I.C., § 28-12-530, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-710.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Aggrieved party". Section 1-201(2).

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

28-12-531. Standing to sue third parties for injury to goods. — (1) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract (i) the lessor has a right of action against the third party, and (ii) the lessee also has a right of action against the third party if the lessee:

- (a) Has a security interest in the goods;
- (b) Has an insurable interest in the goods; or
- (c) Bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.

(2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his suit or settlement, subject to his own interest, is as a fiduciary for the other party to the lease contract.

(3) Either party with the consent of the other may sue for the benefit of whom it may concern.

History.

I.C., § 28-12-531, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-722.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References: "Action". Section 1-201(1).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

"Rights". Section 1-201(36).

"Security interest". Section 1-201(37).

28-12-532. Lessor's rights to residual interest. — In addition to any other recovery permitted in this chapter or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

History.

I.C., § 28-12-532, as added by 1993, ch. 287, § 1, p. 977.

OFFICIAL COMMENT

Uniform Statutory Source: None.

Purposes: This section recognizes the right of the lessor to recover under this Article (as well as under other law) from the lessee for failure to comply with the lease obliga-

tions as to the condition of leased goods when returned to the lessor, for failure to return the goods at the end of the lease, or for any other default which causes loss or injury to the lessor's residual interest in the goods.

CHAPTERS 13 — 20

[RESERVED]

CHAPTER 21

**INDORSEMENT OF NONNEGOTIABLE
INSTRUMENTS**

SECTION.

28-21-101. Indorsement of written contract.
28-21-102. Liability of indorser.

SECTION.

28-21-103. Provisions in conflict.

28-21-101. Indorsement of written contract. — A nonnegotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement transfers all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement.

History.

R.S., § 3600; reen. R.C. & C.L., § 3654;
C.S., § 6063; I.C.A., § 26-1801.

JUDICIAL DECISIONS

ANALYSIS

Application of section.
Indorsement.
Nonnegotiable instruments.
Proof of ownership.
Village warrants.

Application of Section.

This and the following section refer only to written evidences of debts sold and transferred for value, and not to those deposited as collateral security. *Murphy v. Bartsch*, 2 Idaho (Hasb.) 636, 23 P. 82 (1890); *Radke v. Liberty Ins. Co.*, 37 Idaho 436, 216 P. 1040 (1923); *Neitzel v. Beam*, 42 Idaho 411, 245 P. 936 (1926).

Indorsement.

Mere indorsement does not operate to transfer or assign nonnegotiable instrument. There must be delivery. *Neitzel v. Beam*, 42 Idaho 411, 245 P. 936 (1926).

Nonnegotiable Instruments.

Time check issued to laborer is nonnegotiable written contract for payment of money within this section. *Robinson v. St. Maries Lumber Co.*, 34 Idaho 707, 204 P. 671 (1921).

Conditional sale contract for automobile is nonnegotiable instrument subject to all defenses against assignee that existed at time of assignment. *Pacific Acceptance Corp. v. Whalen*, 43 Idaho 15, 248 P. 444 (1926).

Purchaser under conditional sale contract is not precluded from defending against assignee on ground of fraud or want of consideration; notwithstanding provision of contract intended to grant immunity on that ground. *Pacific Acceptance Corp. v. Whalen*, 43 Idaho 15, 248 P. 444 (1926).

Proof of Ownership.

In suit to foreclose mortgage and for judgment on note where plaintiff had possession of note and mortgage and introduced them in evidence, his testimony that he was the owner and holder of same was thereby corroborated. *Brown v. Deck*, 65 Idaho 710, 152 P.2d 587 (1944).

Village Warrants.

Village warrants held not "contracts for the payment of money" within this section. *Hughes v. Nichols*, 50 Idaho 722, 300 P. 361 (1931).

Cited in: *Carstensen & Anson Co. v. Wright*, 25 Idaho 492, 138 P. 830 (1914).

RESEARCH REFERENCES

Am. Jur. — 12 Am. Jur. 2d, Bills and Notes, § 577 et seq.

28-21-102. Liability of indorser. — Every assignor, his heirs, executors or administrators, of every such instrument in writing, is liable to the action of the assignee thereof, his executors, or administrators, if such assignee has used diligence, by the institution and prosecution of a suit against the maker of such instrument, or against his heirs, executors or administrators, for recovery of the money or property due thereon, or damages in lieu thereof; but if the institution of such suit would have been unavailing, or the maker had absconded or left, or was absent from the state when such assigned instrument became due, or absconds within twenty (20) days thereafter, such assignee, his heirs, executors or administrators, may recover against the assignor, or his heirs, executors or administrators, as if due diligence by suit had been used. By "due diligence" shall be understood the institution of suit within sixty (60) days after the maturity of the obligation.

History.

R.S., § 3601; reen. R.C. & C.L., § 3655;
C.S., § 6064; I.C.A., § 26-1802.

JUDICIAL DECISIONS**ANALYSIS**

Assignee suing on note.

Assignor not obliged to repurchase.

Defenses.

Assignee Suing on Note.

It is duty of assignee of nonnegotiable instrument to bring suit thereon under terms and conditions of this section. *Robinson v. St. Maries Lumber Co.*, 34 Idaho 707, 204 P. 671 (1921).

Assignor Not Obligated to Repurchase.

Assignor is under no legal obligation to repurchase nonnegotiable instrument from

assignee upon default of maker. *Robinson v. St. Maries Lumber Co.*, 34 Idaho 707, 204 P. 671 (1921).

Defenses.

Nonnegotiable securities are always subject in hands of pledgee to existing equities. *Radke v. Liberty Ins. Co.*, 37 Idaho 436, 216 P. 1040 (1923).

28-21-103. Provisions in conflict. — To the extent that the provisions of this chapter may conflict with provisions of the Uniform Commercial Code, the provisions of the Uniform Commercial Code shall control in transactions where applicable.

History.

I.C., § 27-1803, as added by 1967, ch. 272, § 2, p. 745.

STATUTORY NOTES**Compiler's Notes.**

Section 33 of S.L. 1967, ch. 272 provides that transactions validly entered into before the effective date specified in § 32 [January 1, 1968] and the rights, duties and interests flowing from them remain valid thereafter, and may be terminated, completed, consummated or enforced as required or permitted by

any statute amended by this act as though such amendment had not occurred.

Effective Dates.

Section 32 of S.L. 1967, ch. 272 provides that this section becomes effective at midnight on December 31, 1967, simultaneously with the Uniform Commercial Code.

CHAPTER 22**MONEY OF ACCOUNT AND INTEREST****SECTION.**

28-22-101 — 28-22-103. [Repealed.]

28-22-104. Legal rate of interest.

28-22-105. Checks dishonored by nonacceptance or nonpayment — Liability for interest — Collection costs and attorney's fees.

SECTION.

28-22-106. Statutory form for notice of dishonor.

28-22-107. Consequences for failing to comply with requirements.

28-22-108 — 28-22-112. [Repealed.]

28-22-101 — 28-22-103. Money of account — Money of other denominations — Computation of judgments. [Repealed.]

STATUTORY NOTES**Compiler's Notes.**

These sections, which comprised 1879, p. 7, §§ 1 to 3; R.S., §§ 1260 to 1262; reen. R.C. & C.L., §§ 1534 to 1536; C.S., §§ 2548 to 2550;

I.C.A., §§ 26-1901 to 26-1903 were repealed by S.L. 1983, ch. 119, § 2 and § 28-49-106, which itself was repealed by S.L. 2002, ch. 301, § 9.

28-22-104. Legal rate of interest. — (1) When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of twelve cents (12¢) on the hundred by the year on:

1. Money due by express contract.

2. Money after the same becomes due.
3. Money lent.
4. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied.
5. Money due on the settlement of mutual accounts from the date the balance is ascertained.
6. Money due upon open accounts after three (3) months from the date of the last item.

(2) The legal rate of interest on money due on the judgment of any competent court or tribunal shall be the rate of five percent (5%) plus the base rate in effect at the time of entry of the judgment. The base rate shall be determined on July 1 of each year by the Idaho state treasurer and shall be the weekly average yield on United States treasury securities as adjusted to a constant maturity of one (1) year and rounded up to the nearest one-eighth percent (1/8%). The base rate shall be determined by the Idaho state treasurer utilizing the published interest rates during the second week in June of the year in which such interest is being calculated. The legal rate of interest as announced by the treasurer on July 1 of each year shall operate as the rate applying for the succeeding twelve (12) months to all judgments declared during such succeeding twelve (12) month period. The payment of interest and principal on each judgment shall be calculated according to a three hundred sixty-five (365) day year.

History.

1879, p. 7, § 4; R.S., § 1263; am. 1897, p. 95, § 1; reen. 1899, p. 315, § 1; reen. R.C. & C.L., § 1537; C.S., § 2551; I.C.A., § 26-1904; am. 1933, ch. 197, § 1, p. 390; am. 1974, ch.

229, § 1, p. 1586; am. 1981, ch. 157, § 1, p. 269; am. 1987, ch. 278, § 7, p. 571; am. 1995, ch. 304, § 1, p. 1053; am. 1996, ch. 94, § 1, p. 279.

STATUTORY NOTES**Compiler's Notes.**

As to legal rate or interest determined by the state treasurer, see <http://sto.idaho.gov/Reports/LegalRateOfInterest.aspx>

Section 19 of S.L. 1987, ch. 278 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Effective Dates.

Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987."

JUDICIAL DECISIONS**ANALYSIS**

Alimony and child support.
Arbitrator's award.
Assignment of real property.
Attorney's fee award.
Calculation of award.
Computation of interest on promissory note.
Condemnation proceedings.
Conditional offer of settlement.
Conflict of laws.

Contingent interest-free loan.

Contracts.

Deposit in insolvent bank.

Different rates for prejudgment and postjudgment interest.

Fiduciary's liability for interest.

Fire insurance policy.

Interest.

—After claim becomes due.

—Appropriate rate.

—Entire judgment.

—Interest on deferred payments.

—Offer of settlement.

—Postjudgment.

—Prejudgment.

—Tort claims.

—Unchanging.

Interjudgment.

Judicial decisions not binding.

Lease agreement.

Life insurance policy.

Liquidated demand.

Notes.

Open account.

Pleading and practice.

Pledges.

Purpose.

Res judicata.

Sale of goods.

Service charge.

Surety bond.

Termination of right to interest.

Usury.

Workers' compensation awards.

Alimony and Child Support.

Where there was a balance unpaid on the original decree for alimony and child support, to this sum should be added the appropriate judgment rate of interest. *Strand v. Despain*, 79 Idaho 304, 316 P.2d 262 (1957).

Wife was entitled to interest at the judgment rate under this section on the unpaid balance of the overdue child support payments. *Davis v. Davis*, 114 Idaho 170, 755 P.2d 3 (Ct. App. 1988).

This section is appropriate for assessing the accrual of interest at the judgment rate on the unpaid balance of delinquent child support payments. *Hunsaker v. Hunsaker*, 117 Idaho 192, 786 P.2d 583 (Ct. App. 1990).

The district court committed no error in holding that interest accrues at the judgment rate from the due date on delinquent child support installments. *Hunsaker v. Hunsaker*, 117 Idaho 192, 786 P.2d 583 (Ct. App. 1990).

Arbitrator's Award.

An arbitrator's award is not self-enforcing; such an award requires the imprimatur of a court to be enforced. The award becomes enforceable when a court enters judgment on the award; thus, the arbitrator's award is not a judgment of a tribunal for the purpose of applying the interest rate applicable to judgments

under this section. *Bingham County Comm'n v. Interstate Elec. Co.*, 108 Idaho 181, 697 P.2d 1195 (Ct. App. 1985).

Assignment of Real Property.

Where an assignor of an interest in real property made some payments on the property subsequent to the assignment, he was not entitled to recover interest on such payments since no payment had been due under any contract, no demand for reimbursement had been made prior to litigation, the question of interest was not raised prior to appeal and it was not shown that the person benefiting from the payments had ever received use of the money. *Furness v. Park*, 98 Idaho 617, 570 P.2d 854 (1977).

Attorney's Fee Award.

No prejudgment interest would accrue upon the award of costs and attorney fees; the award simply bears the judgment rate of interest from its effective date. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Calculation of Award.

Because the two claims arising under the same claims were not so closely related that the unliquidated claim rendered the liquidated claim unascertainable, and since there

was no provision of the agreement that provided for a deduction of any unliquidated amount owed distributor from supplier, the trial court properly awarded prejudgment interest on the liquidated award to supplier and did not have to set off unliquidated award to distributor before calculating the prejudgment interest. *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 896 P.2d 949 (1995).

Bankruptcy court properly calculated the prejudgment interest due to a debtor from her insurer. Under this section, the debtor's insurer became obligated to pay the debtor underinsured motorist (UIM) benefits upon payment by the UIM's insurer. *Jones v. State Farm Mut. Auto Ins. (In re Jones)*, 2009 Bankr. LEXIS 5520 (D. Idaho June 22, 2009).

Computation of Interest on Promissory Note.

Where a promissory note providing for interest was one of the items in a mutual accounting between the parties, interest on the balance found due the payee was computed from the date of settlement to the date of judgment, but interest on the note was computed only to the date of settlement. *Jenkins v. Donaldson*, 91 Idaho 711, 429 P.2d 841 (1967).

Condemnation Proceedings.

The condemnee should be allowed interest upon the compensation and damages awarded from the time the condemner either takes possession, or becomes entitled to possession, of the property. *Independent Sch. Dist. v. C.B. Lauch Constr. Co.*, 78 Idaho 485, 305 P.2d 1077 (1957).

In eminent domain proceeding where plaintiff entered into a contractual agreement providing, *inter alia*, for plaintiff to pay defendants 6% interest per annum from April 1, 1967, the date of plaintiff's taking possession of property, on amount of award above a deposit paid into court by plaintiff, it was correct for court to enter judgment comprised of the fair market value of the property less the deposit, interest thereon from April 1, 1967, until date of judgment. *State ex rel. Symms v. Collier*, 93 Idaho 19, 454 P.2d 56 (1969).

Conditional Offer of Settlement.

A conditional offer of settlement during pendency of an appeal, which results in no actual transfer of funds from the judgment debtor to the judgment creditor, does not terminate the running of statutory interest upon the judgment. *Packard v. Joint Sch. Dist. No. 171*, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

Conflict of Laws.

In an action by the United States on behalf of certain laborers and materialmen against a

government contractor and his surety, the question of whether the surety is liable for interest on such claims is governed by the laws of Idaho. *United States ex rel. Belmont v. Mittry Bros. Constr. Co.*, 4 F. Supp. 216 (D. Idaho 1933), *aff'd*, 75 F.2d 79 (9th Cir. 1934).

Contingent Interest-Free Loan.

Where interest-free loan agreement between employer and employee provided that the money would become due upon any one of several alternative contingencies, including termination of employment, and employment was terminated, interest at the legal rate provided by this section accrued upon the loan after employee was terminated and judgment allowing such interest was correctly entered. *IBM Corp. v. Lawhorn*, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984).

Contracts.

This statute makes no classification of liquidated or unliquidated claims. It deals with money due on contracts express or implied and applies as well to unsettled and disputed accounts as to those where the specific sum due was fixed and determined. *Hendrix v. Gold Ridge Mines, Inc.*, 56 Idaho 326, 54 P.2d 254 (1936).

The purchasers of real and personal property under a written contract providing for annual payments of principal without specifying a rate of interest, who made payments of principal as scheduled, were not liable for interest on the principal amount of the contract price. *Linford v. Hunsaker*, 92 Idaho 505, 446 P.2d 627 (1968).

Where a contract of employment specifically gave the defendant corporation six months to complete payment of the redemption price for the stock owned by its former employees, the money owed to the former employees became due six months after they resigned, and interest began to accrue at that point. *Olmstead v. Heidelberg Inn, Inc.*, 105 Idaho 774, 673 P.2d 76 (Ct. App. 1983).

Where plaintiffs had entered into an express contract with regard to their employment, the plaintiffs should have been awarded pre-judgment interest on the unpaid wages, but not on the treble damage penalty. *De Witt v. Medley*, 117 Idaho 744, 791 P.2d 1323 (Ct. App. 1990).

In insurance cases, money becomes due as provided under the express terms of the insurance contract, not from the date of the accident. *Greenough v. Farm Bureau Mut. Ins. Co.*, 142 Idaho 589, 130 P.3d 1127 (2006).

Deposit in Insolvent Bank.

Interest on deposits in insolvent bank begins to run from the date of closing bank against both bank commissioner and his surety, without necessity of demand on the surety, where liability arises from commis-

sioner's breach of official duty. *State ex rel. Allen v. Title Guar. & Sur. Co.*, 27 Idaho 752, 152 P. 189 (1915), appeal dismissed, 240 U.S. 136, 36 S. Ct. 345, 60 L. Ed. 2d 566 (1916).

Different Rates for Prejudgment and Postjudgment Interest.

The court may award prejudgment interest at a higher contract rate, but this section will control the assigned interest rate once the debt is reduced to a judgment. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985).

Fiduciary's Liability for Interest.

Where executrices had secured grain certificates and had unsuccessfully attempted to claim them for themselves, they were properly charged with interest at six per cent from the date of securing certificates on the amount of proceeds of a sale of the grain under the certificates. In *re Randall's Estate*, 64 Idaho 629, 132 P.2d 763 (1942), rehearing denied, 135 P.2d 299 (1943).

Fire Insurance Policy.

Under this section, assignee of a fire insurance policy was entitled to interest from date of insurer's letter denying liability, under policy providing for payment sixty days after satisfactory proof of loss. *Intermountain Ass'n of Credit Men v. Milwaukee Mechanics' Ins. Co.*, 44 Idaho 491, 258 P. 362 (1927).

Interest.

—After Claim Becomes Due.

In an action by the United States on behalf of certain laborers and materialmen against a government contractor and his bondsmen, interest on such claims can be recovered only from the date of the commencement of the action where the amounts due have at all times been in dispute and no demand for payment was made until suit was commenced. *United States ex rel. Belmont v. Mittry Bros. Constr. Co.*, 4 F. Supp. 216 (D. Idaho 1933), *aff'd*, 75 F.2d 79 (9th Cir. 1934).

Interest cannot be collected on past due drainage district bonds, after all attached interest coupons have been paid, unless the drainage district law provides for the payment of such interest. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

This section is a general statute relative to the payment of interest and yields to a special statute on the same subject. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

Plaintiff who leveled land of defendant pursuant to oral agreement but without any stipulation as to charges, and who recovered on the basis that a reasonable charge was \$10 a day was entitled to recover interest at legal rate from date work was completed. *Guyman v. Anderson*, 75 Idaho 294, 271 P.2d 1020 (1954).

One who recovers against an insurance company for attorney fees incurred in defense of tort action, which insurer refused to defend, and for funeral expenses for persons killed in accident as result of negligence of additional insured is entitled to interest on such claims from the respective dates on which the insurer denied liability. *Pendlebury v. Western Cas. & Sur. Co.*, 89 Idaho 456, 406 P.2d 129 (1965).

A lender who agrees that money may be used interest-free has not, thereby, consented to forgo interest after authority to use the money has expired; such expiration occurs upon the due date of the note or loan agreement. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Because prejudgment interest begins to accrue only after the money becomes due, where there was no evidence to show that husband fraudulently or unfairly applied community funds toward his separate purposes, and there was evidence that wife acquiesced to the application of the funds, the reimbursed funds did not become due until the court determined that wife was entitled to those funds. *Swanson v. Swanson*, 134 Idaho 512, 5 P.3d 973 (2000).

Where defendant entered an *Alford* plea to lewd conduct with a minor under sixteen and, as part of his sentence, was required to pay a \$5,000 fine, the fine imposed on defendant was subject to accrual of interest until paid in full. *State v. Hillman*, 143 Idaho 295, 141 P.3d 1164 (Ct. App. 2006).

—Appropriate Rate.

Where wife made a claim to interest on the interest income earned by bonds which were awarded to wife in the original divorce decree but which husband retained until April, 1989, the magistrate erred by awarding only an interest rate equal to the actual investment yield of the bonds; the magistrate erroneously determined that wife was not entitled to judgment interest but the appropriate rate was the statutory judgment rate. *Swope v. Swope*, 122 Idaho 296, 834 P.2d 298 (1992).

Idaho public utilities commission declined to impose a 12 percent interest rate that was sought by paging companies in an action seeking refunds for payment for facilities' use brought against a telephone company; the paging companies argued that the commission applied the wrong interest rate. The supreme court agreed because § 62-616 was not broad enough to allow the commission to create an interest rate or to apply the IDAPA 31.41.01.106.01. *Ryder v. Idaho PUC* (In *re Ryder*), 141 Idaho 918, 120 P.3d 736 (2005).

—Entire Judgment.

Interest accrues under state law on the entire amount of a state court judgment, not just on those amounts representing unpaid

support installments. In re Messinger, 241 Bankr. 697 (Bankr. D. Idaho 1999).

—Interest on Deferred Payments.

Trial court erred in equally dividing community stock in a closely held corporation with majority control in the husband and virtually no public market for the stock. Upon remand, if wife received a judgment for a monetary amount equivalent to the value of her shares, she was entitled to interest on any deferred payments at the judgment rate specified in this section and running from the date of judgment, not the date of divorce. Josephson v. Josephson, 115 Idaho 1142, 772 P.2d 1236 (Ct. App. 1989).

—Offer of Settlement.

In plaintiff's personal injury suit for damages, where she won a more favorable verdict from the jury than defendant's settlement offer, plaintiff was entitled to prejudgment interest on the settlement offer. Dyet v. McKinley, 139 Idaho 526, 81 P.3d 1236 (2003), overruled on other grounds, Verska v. St. Alphonsus Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011).

—Postjudgment.

Judgments should include all costs at the date of entry and, thereafter, bear interest at the judgment rate from such date on the full amount of the entire judgment. Bashor v. Beloit, 20 Idaho 592, 119 P. 55 (1911).

Interest on judgment is to be computed from date of entry by clerk in conformity with verdict. Darling v. Fremstadt, 22 Idaho 684, 127 P. 674 (1912).

Trial court properly added statutory interest to amount of judgment where there was sufficient data to calculate amount of interest, though jury failed to include interest in its verdict. Coffin v. Cox, 78 Idaho 111, 298 P.2d 742 (1956).

Interest is allowable for money due on an unpaid judgment entered by any court of competent jurisdiction. Strand v. Despain, 79 Idaho 304, 316 P.2d 262 (1957).

Where action was instituted for the purpose of recovering unliquidated damages, interest on the amount found due as liquidated damages, including costs, was allowable at the judgment rate on the amount adjudged due on the judgment, from the date of the judgment. Thompson Lumber Co. v. Cozier Container Corp., 80 Idaho 455, 333 P.2d 1004 (1958).

Interest is due on a judgment in breach of contract action where certain ascertained amount was due under the contract and the work was performed in accordance with the contract, regardless of the dispute between the parties as to whether such work was properly performed. Mitchell v. Flandro, 95 Idaho 228, 506 P.2d 455 (1973).

Where original judgment for breach of contract was reversed, and modified judgment entered, plaintiff was entitled to interest on damages from date of breach until entry of modified judgment, plus interest on modified judgment from date of entry to satisfaction. Mitchell v. Flandro, 96 Idaho 236, 526 P.2d 841 (1974).

There is no statute expressly exempting the state or any of its political subdivisions from paying interest on amounts due as a result of a judgment rendered against those entities. County of Ada v. Red Steer Drive-Ins of Nev., Inc., 101 Idaho 94, 609 P.2d 161 (1980).

Where statute required trial court to award interest on judgment at the judgment rate, actual award by trial court of less than the judgment rate was in error. Rayl v. Shull Enters., Inc., 108 Idaho 524, 700 P.2d 567 (1985).

Where the original judgment contained no award that could be modified upward or downward, the judgment after remand was not a modification of the earlier judgment with regard to the awarding of post-judgment interest. The court of appeals upheld the order of the district court awarding post-judgment interest only from the date of the judgment after remand. Stueve v. Northern Lights, Inc., 122 Idaho 720, 838 P.2d 323 (Ct. App. 1992).

The application of this section, which does not expressly exclude tort actions from its scope, is tempered by the limitation that, in tort cases, the question of whether money is due awaits an eventual judgment. Van Brunt v. Stoddard, 136 Idaho 681, 39 P.3d 621 (2001).

—Prejudgment.

Where suit involved money due on mutual accounts between lessor and lessee growing out of a written lease, but amount due could not be determined by lease, but only by court determination, trial court did not err in failing to award interest prior to judgment on balances found due. Donaldson v. Josephson, 71 Idaho 207, 228 P.2d 941 (1951).

Where, on housing project, surety sued indemnitors and indemnitors counter-claimed, interest due surety from indemnitors was payable from date balance was ascertained as to money due, which was date of stipulation made part of pre-trial order, not date complaint was filed nor date of judgment. American Cas. Co. v. Idaho First Nat'l Bank, 328 F.2d 138 (9th Cir. 1964).

While court may allow interest from a time prior to judgment, where the amount of liability is liquidated or capable of ascertainment by mere mathematical processes, where evidence as to the amount involved was conflicting and the price used for the award was obtained by merely striking a balance within

the range of prices offered by the evidence, it was proper not to allow interest before judgment. *Farm Dev. Corp. v. Hernandez*, 93 Idaho 918, 478 P.2d 298 (1970).

Where a tenant has been dispossessed through wrongful termination of a lease, and where the damage award includes a projected income stream discounted to present value on the date of termination, the tenant is entitled to prejudgment interest on the value of the leasehold from that date; the interest should be computed at the rate provided by this section. *Bergkamp v. Carrico*, 108 Idaho 476, 700 P.2d 98 (Ct. App. 1985).

Prejudgment interest is allowed where the amount claimed is liquidated or may be ascertained by mathematical computation and if it is not clear, when the sum claimed became due, interest should be allowed from the date the action was commenced. *McGill v. Lester*, 108 Idaho 561, 700 P.2d 964 (Ct. App.), review denied, 116 Idaho 466, 776 P.2d 828 (1985).

A party's prelitigation offer to pay the claims of creditors did not serve to preclude the award of prejudgment interest to the creditors where the offer was conditioned upon the creditor's relinquishment of all their ownership claims over the subject property, no actual tender occurred, and the party had retained the use of the money. *McGill v. Lester*, 108 Idaho 561, 700 P.2d 964 (Ct. App.), review denied, 116 Idaho 466, 776 P.2d 828 (1985).

This section has been interpreted to allow prejudgment interest where the amount of liability is liquidated or capable of ascertainment by mathematical process. *Child v. Blaser*, 111 Idaho 702, 727 P.2d 893 (Ct. App. 1986).

In an action for breach of an agreement to complete a subdivision and to convey three parcels of the subdivision to the purchasers, the purchasers were entitled to prejudgment interest on the amounts they expended for taxes and water assessments against the lots while they were waiting for the vendor to complete the subdivision. *Child v. Blaser*, 111 Idaho 702, 727 P.2d 893 (Ct. App. 1986).

Where, in an action for breach of an agreement to complete a subdivision and to convey three parcels of the subdivision to the purchasers, the trial court determined the value of the parcels based on conflicting expert testimony and upon differing theories of recovery, it could not be said that the value of the lots was ascertainable by mere mathematical process or by a recognized standard, and the purchasers were not entitled to prejudgment interest on the award for the value of the three parcels. *Child v. Blaser*, 111 Idaho 702, 727 P.2d 893 (Ct. App. 1986).

The trial court erred when it calculated prejudgment interest effective from the day that the insurer's claim settlement was ren-

dered rather than from the day that the jury rendered its verdict. *Reynolds v. American Hdwe. Mut. Ins. Co.*, 115 Idaho 362, 766 P.2d 1243 (1988).

In the area of prejudgment interest, equitable principles are emphasized. *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 766 P.2d 751 (1988).

Where a jury's award for lost personal property, although supported by substantial evidence was not determined by reference to an objective, recognized standard, but rather was based on a collective series of ad hoc estimates, prejudgment interest was correctly denied on this part of the plaintiff's claim. *Schenk v. Smith*, 117 Idaho 999, 793 P.2d 231 (Ct. App. 1990).

In order for a party to recover prejudgment interest on the amount of overpayment made with regard to certain real estate contracts, the principal amount due must have been either liquidated or capable of being mathematically and definitely ascertainable. *Burt v. Clarendon Hot Springs Ranch, Inc.*, 117 Idaho 1042, 793 P.2d 715 (Ct. App. 1990).

Although an action for breach of warranty accrues at the time of delivery, that date does not necessarily govern the accrual date for an award of prejudgment interest; rather, an award of prejudgment interest, in order to fulfill its compensatory purpose, should run from the date the damages amount first becomes "fixed" or "ascertainable." *Meldco, Inc. v. Hollytex Carpet Mills, Inc.*, 118 Idaho 265, 796 P.2d 142 (Ct. App. 1990).

Where bank deposited \$6500 with clerk of court in conjunction with claims alleging that (1) bank was liable for that amount to depositor due to bank's payment of depositor's check upon indorsement of unauthorized agent of Colorado company, and (2) bank was liable for that amount to Colorado company for its failure to honor a cashier's check into which depositor's check was converted by unauthorized agent and which was made payable to said company; parties were not disputing with bank over the same \$6500, bank was not an innocent stakeholder, and bank could not avoid prejudgment interest. *Valley Bank v. Monarch Inv. Co.*, 118 Idaho 747, 800 P.2d 634 (1990).

Prejudgment interest was not properly awarded to the plaintiffs because the principal amount of liability had not been judicially reduced to a liquidated amount; therefore, prejudgment interest was not ascertainable by simple mathematical computation because no such interest would accrue until there was a sum certain against which interest could accrue. *Stoor's Inc. v. Idaho Dep't of Parks & Recreation*, 119 Idaho 83, 803 P.2d 989 (1990).

Trial court should not have awarded prejudgment interest in a home construction contract dispute where the principal amount

of liability at the time of the breach of contract was not mathematically and definitely ascertainable; numerous defects existed in the construction of the home and in some of the materials used which affected the value of the installed materials. *Ervin Constr. Co. v. Van Orden*, 125 Idaho 695, 874 P.2d 506 (1993).

Even if a subcontract agreement formed a mutual account, the court properly awarded prejudgment interest to subcontractor from the date of a letter from contractor to subcontractor explaining that liquidated damages were being withheld from subcontractor, where contractor's attorney asserted that the letter did not refer to items included in the subcontract and thus the sums withheld from the subcontractor constituted "money due by express contract"; even if the items enumerated in the letter did relate to the items specified in the subcontract, substantial and competent evidence still supported the conclusion of the judge that the balance of the accounts were ascertained as of the date of the letter, since the withheld sum had not been subsequently amended. *Seubert Excavators, Inc. v. Eucon Corp.*, 125 Idaho 409, 871 P.2d 826 (1994).

Architect was not entitled to pre-judgment interest from state building authority where, based on the agreement between the parties, the principal amount of liability under the agreement was not liquidated or readily ascertainable in a fashion to award pre-judgment interest to architect. *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 917 P.2d 737 (1996).

Where the amount due under a contract was a reasonable price at the time for delivery, but the market price at that time was not readily known or calculated until after the court rendered its decision, there was no error in denying the plaintiff's claim for prejudgment interest. *Lickley v. Max Herbold, Inc.*, 133 Idaho 209, 984 P.2d 697 (1999).

Award of pre-judgment interest was reversed where the increased costs which plaintiff sought as damages were not readily ascertainable until the district court ruled on which of the amounts had been proven to be reasonable. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999).

The magistrate court did not err in allowing post-judgment interest to accrue on a consolidated judgment that included pre-judgment interest. *Worthington v. Thomas*, 134 Idaho 433, 4 P.3d 545 (2000).

The application of this section, which does not expressly exclude tort actions from its scope, is tempered by the limitation that, in tort cases, the question of whether money is due awaits an eventual judgment. *Van Brunt*

v. Stoddard, 136 Idaho 681, 39 P.3d 621 (2001).

This section allowed for prejudgment interest at the judgment rate in cases of money due on an express contract and prejudgment interest could be awarded as a matter of law from the date the sum became due where the amount claimed, even though not liquidated, was capable of mathematical computation. *Dillon v. Montgomery*, 138 Idaho 614, 67 P.3d 93 (2003).

This section did not overcome the presumption of the state's sovereign immunity, and § 67-5316(4) speaks only of "pay" and makes no mention of interest; this language did not qualify as a clear waiver of sovereign immunity; therefore, there was no basis for an award of prejudgment interest to the employee against the Idaho department of correction. *Sanchez v. State*, 143 Idaho 239, 141 P.3d 1108 (2006).

Award of prejudgment interest in an arbitration award of benefits under an underinsured motorist policy, although arguably erroneous, could not be modified by a reviewing court because it was not a mathematical error. *Cranney v. Mut. of Enumclaw Ins. Co.*, 145 Idaho 6, 175 P.3d 168 (2007).

Denial of prejudgment interest on an unjust enrichment claim was proper where a decedent's widow showed that she had sold the decedent's son other property at a steeply discounted price as compensation for his contributions to the purchase and improvement of a ranch, the district court had reduced the son's overall claim in consideration of the benefit he had received in the out-of-state transaction, and, as a result, the countervailing equitable factor asserted by the widow rendered the amount to which the son was entitled unascertainable until the district court rendered its decision. *Ross v. Ross*, 145 Idaho 274, 178 P.3d 639 (Ct. App. 2007).

Trial court did not abuse its discretion in denying trust beneficiaries' request for prejudgment interest where the trial court acted within the boundaries of its discretion, and consistently with the applicable legal standards by examining each factor set out in this section. *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009).

—Tort Claims.

This section does not expressly exclude tort actions from its scope, yet prejudgment interest often is disallowed in tort cases because the question of liability — that is, whether money is due — awaits an eventual judgment of the court; there is a well recognized exception, however, where the tort claim is for conversion of property. *Schenk v. Smith*, 117 Idaho 999, 793 P.2d 231 (Ct. App. 1990).

Where a jury did not make a discrete finding on the value of plaintiff's real estate

under circumstances where plaintiff's house and personal property were destroyed by vandals, but rather where it simply returned a verdict containing a damage award for real and personal property combined, upon such a record, since a specific value was not determined by the jury through an objective market standard, the district court properly disallowed prejudgment interest with respect to this part of the plaintiff's claim. *Schenk v. Smith*, 117 Idaho 999, 793 P.2d 231 (Ct. App. 1990).

—Unchanging.

The interest rate applied to the district court's decision will remain the same until the judgment is paid in full, regardless of how the interest rate fluctuates in future years. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999).

Interjudgment.

Award of interjudgment interest was not appropriate where the additional amount of damages awarded on remand were the result of the district court's factual determination of reasonableness and fair value, which were awarded only after reevaluating the evidence. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999).

Judicial Decisions Not Binding.

Since post-judgment interest is purely a statutory creature, the legislature is not bound by judicial decisions or case law in amending statutorily created rights such as interest on judgments. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 797 P.2d 1385 (1990), overruled on other grounds, *Verska v. St. Alphonsus Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011).

Lease Agreement.

Since money due under a rental lease agreement is "money due by express contract," statutory interest on a judgment on such a lease is justified. *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979).

Life Insurance Policy.

Interest on amount due under insurance policy dates from the filing of the proof of loss or claim and not from the date of death. *Gem State Mut. Life Ass'n v. Gray*, 77 Idaho 157, 290 P.2d 217 (1955).

Liquidated Demand.

Where the amount of liability is liquidated or capable of ascertainment by mere mathematical processes, interest may be allowed from a time prior to judgment. *United States Fid. & Guar. Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 452 P.2d 993 (1969).

Where a claim for withheld payment on a construction contract clearly was for a fixed, liquidated amount, the fact that it was subject

to reduction, and was in fact reduced, did not change its liquidated character. *Seubert Excavators, Inc. v. Eucon Corp.*, 125 Idaho 744, 874 P.2d 555 (Ct. App. 1993), rev'd in part, 125 Idaho 409, 871 P.2d 826 (1994).

Notes.

Court properly allowed interest on a note from the date of maturity though the note did not provide for interest on principal of the note during its one year period. *Land Dev. Corp. v. Cannaday*, 77 Idaho 237, 290 P.2d 1087 (1955).

Open Account.

Where laborers on mine were entitled to credits and off-sets, their accounts were "open accounts." *Hendrix v. Gold Ridge Mines, Inc.*, 56 Idaho 326, 54 P.2d 254 (1936).

Pleading and Practice.

Where interest is not demanded in complaint for damages, it is error to instruct jury to return a verdict for interest. *Haner v. Northern Pac. Ry.*, 7 Idaho 305, 62 P. 1028 (1900).

Pledges.

It is not necessary to constitute a pledge that the debt be evidenced by a promise to pay in writing, nor is it necessary to show that any particular rate of interest was agreed upon, as these are matters which are implied from the debt. *Isaak v. Journey*, 52 Idaho 392, 15 P.2d 1069 (1932).

Purpose.

The apparent policy of this statute is to insure that a prevailing party will receive all the rights and benefits of a money judgment when it is due. *Hunsaker v. Hunsaker*, 117 Idaho 192, 786 P.2d 583 (Ct. App. 1990).

Res Judicata.

Creditor was barred by the doctrine of res judicata from asserting a claim to post-petition interest in state court which creditor did not claim in bankruptcy court. *Chenoweth v. Sanger*, 123 Idaho 189, 846 P.2d 191 (1993).

Sale of Goods.

Seller may not recover interest exceeding statutory amount, notwithstanding parties customarily violated statute. *Davidson Grocery Co. v. Payette Equity Exch.*, 51 Idaho 423, 6 P.2d 149 (1931).

This section is violated by ten per cent charge on monthly balance due seller of merchandise, in absence of contract fixing interest on balance at that rate. *Davidson Grocery Co. v. Payette Equity Exch.*, 51 Idaho 423, 6 P.2d 149 (1931).

Service Charge.

Service charge of one and one-half percent per month imposed on past due accounts was not a loan of money, nor was it the forbear-

ance or extension of time for payment on an existing debt; consequently, it was not a usurious charge. *Terrell, Inc. v. Robert DeShazo Bldrs., Inc.*, 104 Idaho 518, 661 P.2d 303 (1983) (decision based on section prior to 1981 amendment).

Surety Bond.

Where livestock producer had sold cattle to meat company through a registered livestock dealer, two of the drafts drawn against meat company by dealer were not paid and livestock producer made written demand for payment against dealer and his surety, which demands were denied, livestock producer was entitled to recover interest on principal of dealer's bond from date of surety's rejection of its claim, as well as from date of entry of judgment against surety. *United States Fid. & Guar. Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 452 P.2d 993 (1969).

Termination of Right to Interest.

Payment of a judgment by the judgment debtor will terminate the creditor's right to statutory interest only if payment is tendered unconditionally and without prejudice to the judgment creditor's right to appeal. *Packard v. Joint Sch. Dist. No. 171*, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

Usury.

Where note provides for interest at ten per cent per annum both before and after judgment, and it does not appear that there was corrupt intent on part of lender to receive an unlawful rate of interest, it is not a usurious contract. *Anderson v. Creamery Package Mfg. Co.*, 8 Idaho 200, 67 P. 493 (1902).

Where note provides for interest at rate of eighteen per cent and note, so far as interest is concerned, is held void for usury by judgment, interest will be allowed under this section. *Finney v. Moore*, 9 Idaho 284, 74 P. 866 (1903).

The trial court may not raise the issue of usury on its own motion. *Reynolds v. Continental Mtg. Co.*, 85 Idaho 172, 377 P.2d 134 (1962).

Where the parties to an oral agreement to purchase farm machinery mistakenly believed the going rate of interest being charged by a production credit association at the time the agreement was made to be 5% per annum when in fact the rate was 6% per annum, and where this mistaken belief was attributable to buyer's representation that he was paying 5% interest to the association which seller relied upon in making the oral agreement, buyer was estopped from asserting, in seller's suit to collect the balance due, that the agreement was usurious at its inception. *Barnes v. Huck*, 97 Idaho 173, 540 P.2d 1352 (1975).

Workers' Compensation Awards.

This section does not authorize the incorporation of interest on an award by the indus-

trial accident board as the statute limits interest to judgments rendered on appeal to the district or supreme court. *State Ins. Fund v. Hunt*, 52 Idaho 639, 17 P.2d 354 (1932).

The district court was without authority to enter judgment ordering interest payment on death compensation instalment not in arrears. *Cain v. C.C. Anderson Co.*, 67 Idaho 1, 169 P.2d 505 (1946).

Cited in: *State v. Fitzpatrick*, 5 Idaho 499, 51 P. 112 (1897); *Valley Lumber Co. v. McGilvery*, 16 Idaho 338, 101 P. 94 (1908); *Lawson v. Lawson*, 87 Idaho 444, 394 P.2d 1008 (1964); *Ridley v. VanderBoegh*, 95 Idaho 456, 511 P.2d 273 (1973); *Rangen, Inc. v. Valley Trout Farms, Inc.*, 104 Idaho 284, 658 P.2d 955 (1983); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Brown v. Jerry's Welding & Constr. Co.*, 104 Idaho 893, 665 P.2d 657 (1983); *Idaho Falls Bonded Produce & Supply Co. v. General Mills Restaurant Group, Inc.*, 105 Idaho 46, 665 P.2d 1056 (1983); *Thompson v. Kirsch*, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984); *Eagle Sewer Dist. v. Hormaechea*, 109 Idaho 418, 707 P.2d 1057 (Ct. App. 1985); *Vogt v. Madden*, 110 Idaho 6, 713 P.2d 442 (Ct. App. 1985); *Homes By Bell-Hi, Inc. v. Wood*, 110 Idaho 319, 715 P.2d 989 (1986); *Lee v. Peterson*, 110 Idaho 601, 716 P.2d 1373 (Ct. App. 1986); *Ward v. Lupinacci*, 111 Idaho 40, 720 P.2d 223 (Ct. App. 1986); *Dursteler v. Dursteler*, 112 Idaho 594, 733 P.2d 815 (Ct. App. 1987); *Jones v. Whiteley*, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987); *Culp v. Tri-County Tractor, Inc.*, 112 Idaho 894, 736 P.2d 1348 (Ct. App. 1987); *Modern Mills, Inc. v. Havens*, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987); *Inland Title Co. v. Comstock*, 116 Idaho 701, 779 P.2d 15 (1989); *Magic Valley Radiology Assocs. v. Professional Bus. Servs., Inc.*, 119 Idaho 558, 808 P.2d 1303 (1991); *Platt v. Brown*, 120 Idaho 41, 813 P.2d 380 (Ct. App. 1991); *Desfosses v. Desfosses*, 120 Idaho 354, 815 P.2d 1094 (Ct. App. 1991); *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991); *Anderson-Blake, Inc. v. Los Caballeros, Ltd.*, 120 Idaho 660, 818 P.2d 775 (Ct. App. 1991); *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 821 P.2d 973 (1991); *Bonaparte v. Neff*, 122 Idaho 714, 838 P.2d 317 (Ct. App. 1992); *University of Utah Hosp. & Medical Ctr. v. Twin Falls County*, 122 Idaho 1010, 842 P.2d 689 (1992); *McKay Constr. Co. v. Ada County*, 126 Idaho 923, 894 P.2d 156 (Ct. App. 1995); *Haley v. Clinton*, 128 Idaho 123, 910 P.2d 795 (Ct. App. 1996); *Conley v. Whittlesey*, 133 Idaho 265, 985 P.2d 1127 (1999); *Kidd Island Bay Water Users Coop. Ass'n v. Miller*, 136 Idaho 571, 38 P.3d 609 (2001); *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 43 P.3d 768 (2002); *Sainsbury Constr. Co. v. Quinn*, 137 Idaho 269, 47 P.3d

772 (Ct. App. 2002); *Meyers v. Hansen*, 148 Idaho 283, 221 P.3d 81 (2009).

RESEARCH REFERENCES

A.L.R. — Date from which interest on judgment starts running, as affected by modification of amount of judgment on appeal. 4 A.L.R.3d 1221.

Advance in price for credit sale as compared with cash sale as usury. 14 A.L.R.3d 1065.

Validity and construction of provision (escalator clause) in land contract or mortgage that rate of interest payable shall increase if the legal rate is raised. 60 A.L.R.3d 473.

Allowance of prejudgment interest or builder's recovery in action for breach of construction contract. 60 A.L.R.3d 487.

Right of holder of commercial paper to interest or finance charges applicable to period after acceleration of maturity of obligation because of debtor's default. 63 A.L.R.3d 10.

Measure of damages in action for breach of warranty of title to personal property under UCC § 2-714. 94 A.L.R.3d 583.

Running of interest on judgment where both parties appeal. 11 A.L.R.4th 1099.

Usury in connection with loan calling for variable interest rate. 18 A.L.R.4th 1068.

Validity and construction of state statute or rule allowing or changing rate of prejudgment interest in actions. 40 A.L.R.4th 147.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts. 41 A.L.R.4th 694.

Recognition of action for damages for wrongful foreclosure — General views. 81 A.L.R.6th 161.

28-22-105. Checks dishonored by nonacceptance or nonpayment — Liability for interest — Collection costs and attorney's fees. —

Whenever a check, as defined in section 28-3-104, Idaho Code, has been dishonored by nonacceptance or nonpayment and has not been paid within fifteen (15) days and after the holder of such check sends such notice of dishonor as provided in section 28-22-106, Idaho Code, to the drawer, then if the check does not provide for the payment of interest, or collection costs and attorney's fees, the drawer of such check shall also be liable for payment of interest at the rate of twelve percent (12%) per annum from the date of dishonor and cost of collection not to exceed twenty dollars (\$20.00) or the face amount of the check, whichever is the lesser; provided however, that if the holder of the dishonored check has the right to collect a set fee under a written agreement or has notified the drawer by a posted notice at the point of sale that the drawer will be required to pay a set collection fee if the check is dishonored, the holder is not required to give the notice of dishonor as provided in section 28-22-106, Idaho Code, and may assess a collection cost of the notice amount regardless of the size of the check, but the set fee may not exceed twenty dollars (\$20.00). In addition, in the event of court action on the check, the court, after such notice and the expiration of said fifteen (15) days, shall award reasonable attorney's fees as part of the damages payable to the holder of the check. No attorney's fees may be awarded to a collection agency in a proceeding pursuant to section 1-2301A, Idaho Code. The provisions of this section shall not apply to any check which has been dishonored by reason of any justifiable stop payment order.

History.

I.C., § 28-22-105, as added by 1994, ch. 185, § 1, p. 603; am. 1996, ch. 373, § 5, p. 1269; am. 2002, ch. 288, § 2, p. 833.

STATUTORY NOTES

Prior Laws. 50, was repealed by S.L. 1983, ch. 119, § 2
Former § 28-22-105, which comprised I.C., and § 28-49-106.
§ 28-22-105, as added by 1979, ch. 34, § 2, p.

28-22-106. Statutory form for notice of dishonor. — The notice of dishonor shall be sent either:

- (1) By certified mail to the drawer at his last known address, or
- (2) By regular mail, supported by an affidavit of service by mailing, to the address printed or written on the check.
- (a) The affidavit of service by mailing shall be retained by the payee or holder of the check.
- (b) Notice shall be deemed conclusive three (3) days following the date the affidavit is executed.
- (c) The affidavit of service shall be substantially in the following form:

STATE OF) AFFIDAVIT OF SERVICE
) BY MAIL
COUNTY OF)
....., being first duly sworn on oath, deposes and states that he/she is of legal age and that on (date),, he/she served the attached Notice of Dishonor, by placing a true and correct copy thereof securely enclosed in an envelope addressed as follows:
.....
.....
.....
.....
.....
and deposited the same, with postage prepaid, in the United States mail at
.....
(Signature)
Subscribed and sworn to before me this day of,
.....
Notary Public
..... County,

(SEAL)

(3) The notice of dishonor shall be substantially in the following form:

NOTICE OF DISHONOR OF CHECK

A check drawn by you and made payable by you to in the amount of has not been accepted for payment by, which is the drawee bank designated on your check. This check is dated, and it is numbered, No.
You are CAUTIONED that unless you pay the amount of this check within fifteen (15) days after the date this letter is postmarked, you may very well have to pay the following additional amounts:

(1) Costs of collecting the amount of the check, including an attorney fee which will be set by the court; and

(2) Interest on the amount of the check which shall accrue at the rate of twelve percent (12%) per annum from the date of dishonor.

You are advised to make your payment to at the following address:

(4) The issuance of a check with an address printed or written on it is a representation by the drawer that the address is the correct address for receipt of mail concerning the check. Failure of the drawer to receive a regular or certified mail notice sent to that address is not a defense to liability under this section provided the drawer has had actual notice for fifteen (15) days that the check has been dishonored.

(5) The check is prima facie evidence of the identity of the drawer if the name, home or work address, and home or work telephone number of the drawer are either recorded by the person receiving the check or printed on the face of the check.

History.

I.C., § 28-22-106, as added by 1994, ch. 185, § 2, p. 603; am. 2002, ch. 288, § 3, p. 833.

STATUTORY NOTES

Prior Laws.

Former § 28-22-106, which comprised C.L., § 1539; am. 1919, ch 114, § 2, p. 400; 1879, p. 7, § 6; R.S., § 1265; reen. R.C. & C.S., § 2553; I.C.A., § 26-1906, was repealed by S.L. 1983, ch. 119, § 2 and § 28-49-106.

28-22-107. Consequences for failing to comply with requirements. — No interest, collection costs and attorney's fees shall be recovered on any dishonored check under the provisions of section 28-22-105, Idaho Code, where the holder of such check or any agent, employee or assignee of the holder has demanded:

(1) Interest or collection costs in excess of that provided in section 28-22-105, Idaho Code; or

(2) Interest or collection costs prior to the expiration of fifteen (15) days after the mailing of notice of dishonor, as provided in sections 28-22-105 and 28-22-106, Idaho Code; or

(3) Attorney's fees, either without having such fees set by the court, or prior to the expiration of fifteen (15) days after the mailing of notice of dishonor, as provided in sections 28-22-105 and 28-22-106, Idaho Code.

The provisions of this section shall not prohibit the collection of a set collection fee which does not exceed twenty dollars (\$20.00), if the holder has the right to collect a set fee under a written agreement or has notified the drawer at the point of sale that the drawer will be required to pay the set collection fee in the event a check is dishonored.

History.

I.C., § 28-22-107, as added by 1994, ch. 185, § 3, p. 603; am. 1996, ch. 373, § 6, p. 1269; am. 2002, ch. 288, § 4, p. 833.

STATUTORY NOTES

Prior Laws.

Former § 28-22-107, which comprised R.S., § 1266; reen. R.C. & C.L., § 1540; am. 1919, ch. 114, § 3, p. 400; reen. C.S., § 2554; I.C.A.,

§ 26-1907; am. 1933, ch. 197, § 3, p. 390, was repealed by S.L. 1983, ch. 119, § 2 and § 28-49-106.

28-22-108 — 28-22-112. Interest — Usury. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised 1957, ch. 233, §§ 1 to 4, p. 545; am. 1965, ch. 134, § 1, p. 262; 1965, ch. 309, § 1, p. 841; am. 1967,

ch. 60, §§ 1, 2, p. 173; am. 1967, ch. 213, § 1, p. 643; am. 1982, ch. 309, § 1, p. 773, were repealed by S.L. 1983, ch. 119, § 2 and § 28-49-106.

CHAPTER 23

REPURCHASE OF FARM MACHINERY AND EQUIPMENT UPON TERMINATION OF CONTRACT

SECTION.

- 28-23-101. Repurchase of farm machinery, equipment, construction equipment, implements, attachments, accessories and parts upon termination of contract and obligation to repurchase.
- 28-23-102. Repurchase of repair parts.
- 28-23-103. Provisions of contract supplemented.
- 28-23-104. Death of dealer — Repurchase from heirs.
- 28-23-105. Failure to pay sums specified on

SECTION.

- cancellation of contracts — Liability.
- 28-23-106. Exceptions.
- 28-23-107. Definition.
- 28-23-108. Guaranty and security agreement notice requirements.
- 28-23-109. Guaranty and security agreement personal asset limit.
- 28-23-110. Penalty for failure to give notice or obtain consent.
- 28-23-111. Application.
- 28-23-112. Jurisdiction — Venue.
- 28-23-113. Definitions.

28-23-101. Repurchase of farm machinery, equipment, construction equipment, implements, attachments, accessories and parts upon termination of contract and obligation to repurchase. — Whenever any person, firm, or corporation engaged in the business of selling and retailing farm implements or equipment, or repair parts for farm implements or equipment, enters into a written or parol contract, sales agreement or security agreement whereby the retailer agrees with any wholesaler, manufacturer or distributor of farm implements or equipment, machinery, attachments, accessories or repair parts to maintain a stock of parts which may include, but is not limited to, complete or whole machines, attachments, or demonstration and rental equipment and thereafter the written or parol contract, sales agreement or security agreement is terminated, canceled or discontinued, then the wholesaler, manufacturer or distributor shall pay to the retailer or credit to the retailer's account, if the retailer has outstanding any sums owing the wholesaler, manufacturer or distributor, unless the retailer should desire and has a contractual right to keep such merchandise, a sum equal to one hundred percent (100%) of the net cost of all unused, unsold and undamaged complete farm implements or equipment, machinery or repair parts and stock of parts, attachments in

new condition which have been purchased by the retailer from the wholesaler, manufacturer or distributor within the thirty-six (36) months immediately preceding notification by either party of intent to cancel or discontinue the contract, including the transportation charges to the retailer. The payment or credit for demonstration or rental equipment that has not been retailed to an end user is a sum equal to the depreciated value of the equipment. The wholesaler, manufacturer or distributor shall pay to the retailer a reasonable reimbursement for services performed in connection with the assembly and predelivery inspections of the farm equipment and attachments. The supplier assumes ownership of farm implements or equipment, machinery or repair parts and stock FOB the dealer location.

A supplier must repurchase any specific data processing hardware, software, telecommunications equipment and computer communications hardware specifically required by the supplier to meet the supplier's minimum requirements and purchased by the dealer in the prior five (5) years and held by the dealer on the date of termination. The purchase price is the original net cost to the dealer, less twenty percent (20%) per year.

History.

1975, ch. 97, § 1, p. 197; am. 1986, ch. 248, § 1, p. 668; am. 2005, ch. 238, § 1, p. 730; am. 2011, ch. 270, § 2, p. 730.

STATUTORY NOTES**Amendments.**

The 2011 amendment, by ch. 270, inserted "equipment, construction equipment" in the section heading; inserted "or equipment" throughout the first paragraph; inserted "un-

sold and undamaged" near the end of the first sentence; and deleted "to which the supplier and the retailer have agreed" following "value of the equipment" in the second sentence in the first paragraph.

28-23-102. Repurchase of repair parts. — Whenever any person, firm, or corporation engaged in the business of selling and retailing farm implements or equipment, or repair parts for farm implements or equipment, enters into a written or parol contract, sales agreement or security agreement whereby the retailer agrees with any wholesaler, manufacturer or distributor of farm implements or equipment, machinery, attachments, accessories or repair parts to maintain a stock of parts or complete or whole machines, or attachments, manuals and repair manuals and thereafter the written or parol contract, sales agreement or security agreement is terminated, canceled or discontinued, then the wholesaler, manufacturer or distributor shall pay to the retailer or credit to the retailer's account, if the retailer has outstanding any sums owing the wholesaler, manufacturer or distributor, unless the retailer should desire and has a contractual right to keep such merchandise, a sum equal to one hundred percent (100%) of the current net prices, including the transportation charges from the retailer to the wholesaler, manufacturer or distributor which have been paid by the retailer, or invoiced to a retailer's account by the wholesaler, manufacturer or distributor, on manuals and repair manuals, repair parts, including superseded or previously included parts listed in current price lists or catalogs or electronic catalogs in use, or previously used within thirty-six (36) months prior to the latest parts price list issue date by the wholesaler,

manufacturer or distributor on the date of cancellation or discontinuance of the contract, which parts had previously been purchased by the retailer from the wholesaler, manufacturer or distributor and are held by the retailer on the date of the cancellation or discontinuance of the contract or thereafter received by the retailer from the wholesaler, manufacturer or distributor.

The wholesaler, manufacturer or distributor shall also pay the retailer or credit to his account a sum equal to five percent (5%) of the current net price of all parts returned for the handling, packing and loading of the parts back to the wholesaler, manufacturer or distributor unless the wholesaler, manufacturer or distributor elects to perform inventorying, packing and loading of the parts themselves.

Upon the payment or allowance of credit to the retailer's account of the sum required by this section and section 28-23-101, Idaho Code, the title to the farm implements, equipment, machinery, attachments, accessories or repair parts shall pass to the manufacturer, wholesaler or distributor making the payment or allowing the credit and the manufacturer, wholesaler or distributor shall be entitled to the possession of the farm implements, equipment, machinery, attachments, accessories or repair parts. Title to farm implements, equipment, attachments, accessories and repair parts is transferred to the supplier FOB the dealer location. The provisions of this section shall apply to any part return adjustment agreement made between a dealer and a supplier. All payments or allowances of credit due retailers under this section shall be paid or credited by the manufacturer, wholesaler, or distributor within ninety (90) days from the termination date of the dealer agreement. After the ninety (90) days all sums of credits due shall include interest at the rate specified in section 28-22-104(1), Idaho Code. However, this section and section 28-23-101, Idaho Code, shall not in any way affect any security interest which the wholesaler, manufacturer or distributor may have in the inventory of the retailer.

A supplier shall repurchase at one hundred percent (100%) of net dealer cost, manuals and repair manuals purchased in the previous six (6) years and at fifty percent (50%) for manuals and repair manuals purchased in the previous seven (7) through twelve (12) years as required by the supplier and held by the dealer on the date of termination. Manuals and repair manuals must be unique to the supplier's product line and must be in complete and in readable condition.

A supplier must repurchase, and the dealer must sell to the supplier, specialized repair tools. As applied in this section, "specialized repair tools" is defined as those tools required by the supplier and unique to the diagnosis or repair of the supplier's products. For specialized repair tools that are in new, unused condition and are applicable to the supplier's current products, the purchase price is one hundred percent (100%) of the original net cost to the dealer. For all other specialized repair tools, in complete and resalable condition, the purchase price is the original net cost to the dealer less twenty percent (20%) per year depreciation, but not less than fifty percent (50%) of the original purchase price.

A supplier must repurchase, and the dealer must sell to the supplier, current signage. As used in this section, "current signage" means the principal outdoor signage required by the supplier that displays the suppli-

er's current logo or similar exclusive identifier, and that identifies the dealer as representing either the supplier or the supplier's products, or both. The purchase price shall be the original net cost to the dealer less twenty percent (20%) per year, but may in no case be less than fifty percent (50%) of the original cost to the dealer.

History.

1975, ch. 97, § 2, p. 197; am. 1986, ch. 248, § 2, p. 668; am. 2005, ch. 238, § 2, p. 730; am. 2011, ch. 270, § 3, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, inserted "equipment" or "or equipment" throughout the section; and, in the fourth sentence in the third paragraph, substituted "within (90)

days from the termination date of the dealer agreement" for "within (90) days after the return of the farm implements, farm machinery, attachments, accessories or repair parts."

JUDICIAL DECISIONS

Construction.

A dealer's suit under this section to recover the value of parts returned, upon termination of the dealership agreement, is an action to recover on a "contract" relating to the sale of goods within the meaning of § 12-120(2) (now § 12-120(3)). *MH & H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 702

P.2d 917 (Ct. App.), review denied, 116 Idaho 466, 776 P.2d 828 (1985).

The repurchase of parts, as provided by this section is a sale within the definition of § 28-2-106(1). *MH & H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 702 P.2d 917 (Ct. App.), review denied, 116 Idaho 466, 776 P.2d 828 (1985).

28-23-103. Provisions of contract supplemented. — The provisions of this section shall be supplemental to any agreement between the retailer and the manufacturer, wholesaler or distributor covering the return of farm implements, equipment, machinery, attachments or repair parts. The retailer can elect to pursue either his contract remedy or the remedy provided herein, and an election by the retailer to pursue his contract remedy shall not bar his right to the remedy provided herein as to those farm implements, equipment, machinery, attachments or repair parts not affected by the contract remedy. Notwithstanding anything contained herein, the rights of a manufacturer, wholesaler or distributor to charge back to the retailer's account amounts previously paid or credited as a discount incident to the retailer's purchase of goods shall not be affected. Further, any repurchase hereunder shall not be subject to the provisions of the bulk sales law.

History.

1975, ch. 97, § 3, p. 197; am. 2011, ch. 270, § 4, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, in the first and second sentences, inserted "equipment" and substituted "or repair parts" for "and repair parts."

bulk sales were governed by §§ 28-6-101 to 28-6-111. However, those sections of the Idaho Code were repealed by S.L. 1993, ch. 288, § 46, effective July 1, 1993.

Compiler's Notes.

At the time that this section was enacted,

28-23-104. Death of dealer — Repurchase from heirs. — In the event of the death of the retail dealer or a stockholder in a corporation operating a retail dealership in the business of selling and retailing farm implements, equipment, machinery, attachments or repair parts therefor, at the election of the dealer or corporation, the manufacturer, wholesaler or distributor shall, unless the heir or heirs of the deceased elect to continue to operate the dealership, repurchase the merchandise from the heir or heirs upon the same terms and conditions as are otherwise provided in this chapter. In the event the heir or heirs do not agree to continue to operate the retail dealership, it shall be deemed a cancellation or discontinuance of the contract by the retailer under the provisions of sections 28-23-101 and 28-23-102, Idaho Code.

History.

1975, ch. 97, § 4, p. 197; am. 2011, ch. 270,
§ 5, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, in the first sentence, inserted “equipment” and substituted “this chapter” for “this act.”

28-23-105. Failure to pay sums specified on cancellation of contracts — Liability. — In the event that any manufacturer, wholesaler or distributor of farm implements, equipment, machinery, attachments, accessories or repair parts, upon the cancellation of a contract by either a retailer or such manufacturer, wholesaler or distributor, fails or refuses to make payment to the dealer or his heir or heirs as required by the provisions of this chapter, or any other violations of the provisions of this chapter, the manufacturer, wholesaler or distributor shall be liable in a civil action to be brought by the retailer or his heir or heirs for (a) one hundred percent (100%) of the net cost of the farm implements, equipment, machinery, attachments and accessories, (b) transportation charges required in section 28-23-102, Idaho Code, which have been paid by the retailer, or invoiced to the retailer’s account, (c) one hundred percent (100%) of the current net price of repair parts, (d) five percent (5%) for handling, packing and loading, if applicable, (e) one hundred percent (100%) of the current net price for manuals and repair manuals, (f) reasonable reimbursement for services performed in connection with assembly and predelivery inspections of the equipment and (g) additionally, any judgment rendered by a court of competent jurisdiction for the plaintiff in a suit filed pursuant to this section may include damages in the amount of two (2) times the compensatory damages found due and owing [owing]. A person, firm or corporation which brings an action under this section must commence the action in the county in which the principal place of business of the retailer is located.

History.

1975, ch. 97, § 5, p. 197; am. 2005, ch. 238,
§ 3, p. 730; am. 2011, ch. 270, § 6, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, in the first sentence, twice inserted “equipment,” substituted “or repair parts” for “and repair parts” and “required by the provisions of this chapter, or any other violations of the provisions of this chapter” for “required by this section” and added “and (g) additionally, any judgment rendered by a court of competent

jurisdiction for the plaintiff in a law suit filed pursuant to this section may include damages in the amount of two (2) times the compensatory damages found due and owing.”

Compiler’s Notes.

The bracketed insertion at the end of the next-to-last sentence was added by the compiler to supply the probable intended word.

28-23-106. Exceptions. — This act shall not require the repurchase from a retailer of a repair part where the retailer previously has failed to return the repair part to the wholesaler, manufacturer or distributor after being offered a reasonable opportunity to return the repair part at a price not less than one hundred percent (100%) of the net price of the repair part as listed in the then current price list or catalog, and transportation charges required in section 28-23-102, Idaho Code, which have been paid by the retailer, or invoiced to the retailer’s account. This act shall not require the repurchase from a retailer of repair parts the retailer purchased in a set of multiple parts, unless the set is complete and in resalable condition and parts which because of their condition are not resalable without reconditioning.

History.

1975, ch. 97, § 6, p. 197; am. 2005, ch. 238, § 4, p. 730.

STATUTORY NOTES

Compiler’s Notes.

The term “this act” in this section refers to

S.L. 1975, ch. 97, which is codified as §§ 28-23-101 to 28-23-111.

28-23-107. Definition. — For the purposes of this chapter, “farm implements” means every vehicle designed or adapted and used exclusively for agricultural operations and only incidentally operated or used upon the highways and all other consumer products supplied by the wholesaler, manufacturer or distributor of farm implements, equipment, machinery, attachments or repair parts to the retailer pursuant to a written or oral contract, sales agreement or security agreement.

History.

1975, ch. 97, § 7, p. 197; am. 2011, ch. 270, § 7, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, substi-

tuted “this chapter” for “this act” and inserted “equipment” and “or oral.”

28-23-108. Guaranty and security agreement notice requirements. — All wholesalers, manufacturers or distributors of farm implements, equipment, machinery, attachments, accessories or repair parts

shall give the retailer a minimum of ninety (90) days' notice in writing and obtain consent from the dealer before changing the time and manner of payment of any indebtedness owed by retailer to manufacturer, distributor or wholesaler, and before taking and making any changes in notes or security for any indebtedness, and before releasing or adding additional guarantors, and before granting renewals or extensions of such indebtedness.

History.

1975, ch. 97, § 8, p. 197; am. 2005, ch. 238, § 5, p. 730; am. 2011, ch. 270, § 8, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, inserted "equipment" near the beginning of the section.

28-23-109. Guaranty and security agreement personal asset limit. — No party or person signing a security agreement or guaranty agreement with a manufacturer, distributor or wholesaler, shall be required to pledge or encumber its or his personal assets in a value in excess of the amount of the indebtedness secured.

History.

1975, ch. 97, § 9, p. 197.

28-23-110. Penalty for failure to give notice or obtain consent. — In the event that any manufacturer, wholesaler or distributor of farm implements, equipment, machinery, attachments and repair parts fails to give notice or obtain consent pursuant to section 28-23-108, Idaho Code, or fails or refuses to comply with section 28-23-109, Idaho Code, the guaranty or security agreement thereby affected will be deemed cancelled and terminated.

History.

1975, ch. 97, § 10, p. 197; am. 2011, ch. 270, § 9, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, inserted "equipment" near the middle of the section.

28-23-111. Application. — This act shall apply to all franchise agreements, security agreements and guaranty agreements dated prior to July 1, 1975, and all franchise agreements, security agreements and guaranty agreements dated on or after July 1, 1975.

History.

1975, ch. 97, § 11, p. 197.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in this section refers to S.L. 1975, ch. 97, which is codified as §§ 28-23-101 to 28-23-111.

Section 12 of S.L. 1975, ch. 97, provides as

follows: "If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof."

28-23-112. Jurisdiction — Venue. — (1) The courts of this state shall have jurisdiction over any legal dispute between a wholesaler, manufacturer or distributor of farm implements or equipment, machinery, repair parts, stock parts and attachments located in or outside this state and an equipment dealer located in this state. The laws of the state of Idaho shall exclusively apply to such disputes.

(2) Venue for a dispute as provided in subsection (1) of this section shall be in the judicial district wherein the dealer's principal place of business is located.

History.

I.C., § 28-23-112, as added by 2011, ch. 270,
§ 10, p. 730.

28-23-113. Definitions. — The definitions set forth in section 28-24-102, Idaho Code, shall apply to the provisions of this chapter.

History.

I.C., § 28-23-113, as added by 2011, ch. 270,
§ 11, p. 730.

CHAPTER 24

AGREEMENTS BETWEEN SUPPLIERS AND DEALERS OF FARM EQUIPMENT

SECTION.

- 28-24-101. Legislative findings and intent.
- 28-24-102. Definitions.
- 28-24-103. Dealer agreements — Unlawful acts and practices.
- 28-24-104. Termination of dealer agreement or change of equipment dealer's competitive circumstances — Notice — Good cause.
- 28-24-104A. Establishment of new dealership — Supplier's duties.

SECTION.

- 28-24-104B. Warranty claims.
- 28-24-104C. Audit of warranty claims.
- 28-24-104D. Arbitration.
- 28-24-104E. Successors in interest.
- 28-24-105. Remedies and enforcement.
- 28-24-106. Severability.
- 28-24-107. Effective date — Application to agreements.
- 28-24-108. Jurisdiction — Venue.

28-24-101. Legislative findings and intent. — The legislature of this state finds that the retail distribution and sale of agricultural equipment, outdoor power equipment, industrial equipment and construction equipment utilizing independent retail businesses operating under agreements with the manufacturers and distributors thereof, vitally affects the general economy of the state, public interests and public welfare and that it is necessary to regulate the business relations between independent dealers and the equipment manufacturers, wholesalers and distributors.

History.

I.C., § 28-24-101, as added by 1990, ch. 267, § 1, p. 750; am. 2011, ch. 270, § 13, p. 730.

STATUTORY NOTES**Amendments.**

The 2011 amendment, by ch. 270, inserted "outdoor power equipment, industrial equipment and construction equipment."

28-24-102. Definitions. — As used in this chapter:

(1) "Assigned area of responsibility" means the geographic region for which a particular dealer is responsible for the marketing, selling, leasing or servicing of equipment pursuant to a dealer agreement as assigned by the supplier.

(2) "Continuing commercial relationship" means any relationship in which the equipment dealer has been granted the right to sell or service equipment manufactured by supplier.

(3) "Dealer agreement" means a contract or agreement, either expressed or implied, whether oral or written, between a supplier and an equipment dealer, by which the equipment dealer is granted the right to sell, distribute or service the supplier's equipment, where there is a continuing commercial relationship between the supplier and the equipment dealer.

(4) "Demonstration and/or rental equipment" is equipment that has been used but has not been sold to an end user.

(5) "Equipment" means machines designed for or adapted and used for agriculture, horticulture, livestock and grazing and related industries but not exclusive to agricultural use. Equipment also includes:

(a) "All-terrain vehicles" or "ATVs," including three-wheeled and four-wheeled motorized vehicles, generally characterized by large, low-pressure tires, a seat designed to be straddled by the operator, and handlebars for steering. All-terrain vehicles are intended for off-road use.

(b) "Outdoor power equipment" means equipment powered by a two-cycle or four-cycle gas or diesel engine, or electric motor, which is used to maintain commercial, public or residential lawns and gardens or used in landscape, turf, golf course or plant nursery maintenance.

(c) "Industrial and construction equipment" means equipment used in building and maintaining structures and roads including, but not limited to, loaders, loader backhoes, wheel loaders, crawlers, graders and excavators.

(6) "Equipment dealer," "dealer" or "equipment dealership" means any person, partnership, corporation, association or other form of business enterprise, primarily engaged in the retail sale and/or service of equipment in this state, pursuant to any oral or written agreement for a definite or indefinite period of time in which there is a continuing commercial relationship in the marketing of the equipment or related services. "Equipment dealer," "dealer" or "equipment dealership" does not include an individual, partnership or corporation that:

(a) Is primarily engaged in the retail sale and service of industrial and construction equipment;

(b) Has purchased seventy-five percent (75%) or more of the dealer's total

new product inventory from a single supplier under all agreements with that supplier; and

(c) Has a total annual average sales volume in excess of twenty million dollars (\$20,000,000) for the preceding three (3) years with that single supplier for the territory for which the dealer is responsible.

(7) "Good cause" means failure by an equipment dealer to substantially comply with essential and reasonable requirements imposed upon the equipment dealer by the dealer agreement, provided, such requirements are not different from those requirements imposed on other similarly situated equipment dealers in the state either by their terms or in the manner of their enforcement.

(8) "Supplier" means the manufacturer, wholesaler or distributor of the equipment to be sold by the equipment dealer, or any successor in interest to or assignee of the supplier. A successor in interest includes any purchaser of assets or stock, any surviving corporation resulting from merger or liquidation, any receiver or any trustee of the original supplier.

(9) "Used equipment" means equipment that has been sold or retailed to an end user and money has been exchanged between the end user and the equipment dealer.

(10) "Warranty claim" means a claim for payment submitted by an equipment dealer to a supplier for service, parts or complete components, or any or all of the three (3), provided to a customer under a:

(a) Warranty issued by the supplier; or

(b) Recall or modification order issued by the supplier.

History.

I.C., § 28-24-102, as added by 1990, ch. 267, § 1, p. 750; am. 2005, ch. 238, § 6, p. 730; am. 2011, ch. 270, § 14, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, added paragraph (5)(c); in subsection (6), in the introductory paragraph, inserted "dealer" and added the last sentence; added paragraphs (6)(a) through (6)(c); added subsection (9); and

redesignated former subsection (9) as subsection (10), and therein substituted "service, parts or complete components, or any or all of the three (3)" for "service or parts, or both" in the introductory paragraph.

28-24-103. Dealer agreements — Unlawful acts and practices. — It shall be a violation of the provisions of this chapter for a supplier to:

(1) Require or attempt to require any equipment dealer to order or accept delivery of any equipment or parts or any equipment with special features or accessories not included in the base list price of such equipment as publicly advertised by the supplier which the equipment dealer has not voluntarily ordered;

(2) Require or attempt to require any equipment dealer to enter into any agreement, whether written or oral, supplementing or amending an existing dealer agreement with such supplier unless such amendment or supplementary agreement is imposed on other similarly situated dealers in the state;

(3) Refuse to deliver in reasonable quantities and within a reasonable time after receipt of the equipment dealer's order, to any equipment dealer having a dealer agreement for the retail sale of new equipment sold or

distributed by such supplier, equipment covered by such dealer agreement specifically advertised or represented by such supplier to be available for immediate delivery. The failure to deliver any such equipment shall not be considered a violation of the provisions of this chapter when deliveries are based on prior retail sales ordering histories, the priority given to the sequence in which the orders are received or manufacturing schedules or if such failure is due to prudent and reasonable restriction on extension of credit by the supplier to the equipment dealer, an act of God, work stoppage or delay due to a strike or labor difficulty, a bona fide shortage of materials, freight embargo or other cause over which the supplier has no control;

(4) Terminate, cancel or fail to renew the dealer agreement of any equipment dealer or substantially change the competitive circumstances of the dealer agreement, attempt to terminate or cancel, or threaten not to renew the dealer agreement or attempt or threaten to substantially change the competitive circumstances of the dealer agreement without good cause. Nothing in this paragraph shall be interpreted to apply to a discontinuation of or change in the product line of an equipment dealer;

(5) Condition the renewal, continuation or extension of a dealer agreement on the equipment dealer's substantial renovation of the equipment dealer's place of business or on the construction, purchase, acquisition or rental of a new place of business by the equipment dealer, unless:

(a) The supplier has advised the equipment dealer in writing of its demand for such renovation, construction, purchase, acquisition or rental within a reasonable time prior to the effective date of the proposed date of renewal or extension, but in no case less than one (1) year; and

(b) The supplier demonstrates the need for such change in the place of business and the reasonableness of the demand with respect to marketing and servicing the supplier's products and any significant economic conditions existing at the time in the equipment dealer's trade area, and the equipment dealer does not make a good faith effort to complete such construction or renovation plans within one (1) year.

(6) Discriminate in the prices charged for equipment of like grade and quality sold by the supplier to similarly situated dealers in this state where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in a line of commerce. The provisions of this subsection do not prevent the use of differentials which make only due allowance for differences in the cost of manufacture, sale or delivery of equipment resulting from the differing methods or quantities in which such equipment is sold or delivered; provided that nothing shall prevent a supplier from offering a lower price in order to meet an equally low price of a competitor, or the services or facilities furnished by a competitor;

(7) Unreasonably withhold consent for an equipment dealer to change the capital structure of the equipment dealership or the means by which it is financed, provided that the equipment dealer meets the reasonable capital requirements of the supplier;

(8) Prevent, by contract or otherwise, any equipment dealer or any officer, member, partner or stockholder of an equipment dealership from selling, assigning, or transferring any interest or portion thereof held by any of them

in the equipment dealership to any other person or party; provided, however, that no equipment dealer, officer, partner, member or stockholder shall have the right to sell, transfer, or assign the equipment dealership or the power of management or control thereof without the written consent of the supplier, except that such consent shall not be unreasonably withheld if the buyer, transferee, or assignee meets the reasonable financial, business experience and character standards of the supplier. Should a supplier determine that the designated transferee is not acceptable, the supplier shall provide the equipment dealer with written notice of the supplier's objections and specific reasons for withholding its consent within thirty (30) calendar days of receipt of notice from the equipment dealer;

(9) Require an equipment dealer to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this chapter;

(10)(a) Unreasonably withhold consent, in the event of the death of the equipment dealer or the principal owner of the equipment dealership, to the transfer of the equipment dealer's or the principal owner's interest in the equipment dealership to another individual, if the individual meets the reasonable financial, business experience and character standards of the supplier. A supplier shall have sixty (60) days to consider a request to make a transfer to an individual. If, within that period, the supplier determines that the individual does not meet the reasonable financial, business experience and character standards of the supplier, it shall provide the dealership, heirs to the dealership, or the estate of the dealer with written notice of its objection and the specific reasons for withholding its consent. If the individual reasonably satisfies the supplier's objections within sixty (60) days after notice thereof, the supplier shall approve the transfer. Nothing in this paragraph shall entitle a qualified individual to continue to operate the dealership without the consent of the supplier.

(b) Notwithstanding the provisions of paragraph (a) of this subsection, in the event that a supplier and equipment dealer have duly executed an agreement concerning succession rights prior to the equipment dealer's death, and if such agreement has not been revoked, such agreement shall be observed.

(11) Cause the equipment dealer to refrain from participation in the management, investment, acquisition or sale of any other related product or product line of equipment, parts or accessories, from the same or separate locations;

(12) Fail to compensate a dealer for preparation and delivery of equipment that the supplier sells or leases for use within this state and that the dealer prepares for delivery and delivers.

History. 267, § 1, p. 750; am. 2005, ch. 238, § 7, p. I.C., § 28-24-103, as added by 1990, ch. 730.

28-24-104. Termination of dealer agreement or change of equipment dealer's competitive circumstances — Notice — Good cause. —

(1) A supplier shall provide written notice to the equipment dealer of any proposed termination or nonrenewal of a dealer agreement or substantial

change in the competitive circumstances of a dealer agreement. The notice shall state the reason(s) constituting good cause for the action proposed to be taken. Except where good cause is alleged under the provisions of paragraphs (a) through (e) of subsection (2) of this section, such notice shall be provided to the equipment dealer not less than ninety (90) days before the proposed action is to become effective. Except where good cause is alleged under paragraphs (a) through (d) of subsection (2) of this section, the equipment dealer shall be given ninety (90) days within which to cure any claimed deficiency, and the notice shall advise the dealer of his right to cure. If the claimed deficiency is rectified within ninety (90) days, the notice shall be void and the proposed action shall not become effective. Notwithstanding the equipment dealer's failure to cure the deficiency or deficiencies claimed, where a ninety (90) day notice is required to be given by the supplier, the contractual term of the dealer agreement shall not expire, nor shall the dealer agreement be otherwise terminated or canceled, nor shall the equipment dealer's competitive circumstances be substantially changed prior to the expiration of at least ninety (90) days following such notice without the written consent of the equipment dealer.

(2) As used in this chapter, "good cause" shall exist, but not be limited to the following circumstances when the equipment dealer has:

- (a) Transferred a controlling ownership interest in the equipment dealership without the supplier's consent;
- (b) Made a material misrepresentation to the supplier;
- (c) Filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against the equipment dealer which has not been discharged within ninety (90) days after the filing; is in default under the provisions of a security agreement in effect with the supplier; or is insolvent or in receivership;
- (d) Been convicted of a crime, punishable for a term of imprisonment for one (1) year or more;
- (e) Failed to operate in the normal course of business for ten (10) consecutive business days or has terminated said business;
- (f) Relocated the equipment dealer's place of business without the supplier's consent;
- (g) Inadequately represented the supplier over a one (1) year period of time or length of time or a time mutually agreed upon between the supplier and dealer to reflect the ongoing market conditions;
- (h) Consistently failed to meet building and housekeeping requirements, or has failed to provide adequate sales, service or parts personnel commensurate with the dealer agreement;
- (i) Failed to comply with the applicable licensing laws pertaining to the products and services being represented for and on supplier's behalf;
- (j) Materially failed to comply with the terms of the dealer agreement.

(3) Notwithstanding the provisions of subsection (2) of this section, before the termination or nonrenewal of a dealer agreement based upon a supplier's claim that the dealer has failed to achieve market penetration at levels consistent with similarly situated dealerships in the state, the supplier shall provide written notice of its intention at least one (1) year in advance.

(a) After issuance of such a notice, the supplier shall provide fair and reasonable efforts to work with the dealer to assist the dealer in gaining the required market penetration including, but not limited to, making available to the dealer an adequate inventory of new equipment and parts, and not withhold programs available to all dealers.

(b) Upon the end of the one (1) year period established in this subsection (3), the supplier may terminate or elect not to renew the dealer agreement only upon written notice specifying the reasons for determining that the dealer failed to meet reasonable market penetration. The notice must specify that termination or nonrenewal is effective one hundred eighty (180) days from the date of the notice and that either party may petition the court.

(c) A supplier bears the burden of proving that a retailer's area of responsibility or trade area does not afford sufficient sales potential to reasonably support the retailer. The supplier's proof must be in writing.

History.

I.C., § 28-24-104, as added by 1990, ch. 267, § 1, p. 750; am. 2005, ch. 238, § 8, p. 730.

STATUTORY NOTES

Compiler's Notes.

The letter "s" enclosed in parentheses so appeared in the law as enacted.

28-24-104A. Establishment of new dealership — Supplier's duties. — When a supplier enters into an agreement to establish a new dealer or dealership or to relocate a current dealer or dealership for a particular product line or make of equipment, the supplier must give written notice of such an agreement by certified mail to all existing dealers or dealerships whose assigned area of responsibility is contiguous to the new dealer or dealership location. If no area of responsibility has been assigned then the supplier must give written notice of such an agreement by certified mail to the dealers or dealerships within a seventy-five (75) mile radius of the new dealer location. The supplier must provide in its written notice the following information about the proposed new or relocated dealer or dealership:

- (1) The proposed location;
- (2) The proposed date for commencement of operation at the new location; and
- (3) The identities of all existing dealers or dealerships whose assigned area of responsibility is contiguous to the new dealer or dealership location. If no area of responsibility has been assigned then the supplier must give written notice of such an agreement by certified mail to the dealers or dealerships located within a seventy-five (75) mile radius of the new dealer location.

History.

I.C., § 28-24-104A, as added by 2005, ch. 238, § 9, p. 730.

28-24-104B. Warranty claims. — (1) An equipment dealer may submit a warranty claim to a supplier if a warranty defect is identified and documented prior to the expiration of a supplier's warranty:

- (a) While a dealer agreement is in effect; or
- (b) After the termination of a dealer agreement if the claim is for work performed while the dealer agreement was in effect.

(2) A supplier shall accept or reject a warranty claim submitted under subsection (1) of this section, within thirty (30) days of the date the supplier received the claim. A warranty claim not rejected within thirty (30) days of the date the supplier received the claim is considered to be accepted by the supplier.

(3) No later than thirty (30) days after the date a warranty claim is accepted or rejected under subsection (2) of this section, the supplier shall:

- (a) Pay an accepted warranty claim; or
- (b) Send the dealer written notice of the reason the warranty claim was rejected.

(4) A supplier shall compensate the dealer for the warranty claim as follows:

(a) The dealer's established customer hourly retail labor rate multiplied by the reasonable and customary amount of time required to complete such work by similarly situated dealers, including diagnostic time, and cleanup time, expressed in hours and fractions of an hour;

(b) The dealer's current net price on repair parts reimbursed at not less than net plus twenty percent (20%) of the cost for warranty service performed on behalf of the supplier to compensate for reasonable costs of doing business; and

(c) Extraordinary freight and handling costs. For purposes of this subsection (4)(c), "extraordinary freight and handling costs" means costs that are above and beyond the normal reimbursement policy of the supplier for warranty repair work;

(d) When the repair work is for safety or mandatory modifications ordered by the supplier, the supplier shall reimburse the dealer for transportation costs incurred by the dealer.

(5) After payment of a warranty claim, a supplier may not charge back, off-set or otherwise attempt to recover from the dealer all or part of the amount of the claim unless:

- (a) The warranty claim was submitted in error;
- (b) The services for which the warranty claim was made were not properly performed or were unnecessary to comply with the warranty; or
- (c) The dealer did not substantiate the warranty claim according to the written requirements of the supplier that were in effect when the equipment was delivered to the dealer by the customer for warranty repairs.

(6) If a supplier denies a warranty claim due to a particular item or part of the claim, the denial shall only affect the items or parts in question and not the complete warranty claim.

(7) A supplier may not pass the cost of covering warranty claims under this chapter on to a dealer through any means including:

- (a) Surcharges;
- (b) Reduction of discounts; or
- (c) Certification standards.

History.

I.C., § 28-24-104B, as added by 2005, ch. 238, § 9, p. 730; am. 2011, ch. 270, § 15, p. 730.

STATUTORY NOTES**Amendments.**

The 2011 amendment, by ch. 270, deleted former subsection (8), which read: "Notwithstanding the provisions of subsection (4) of

this section, a dealer may accept the supplier's reimbursement terms and conditions in lieu of the terms and conditions set forth in subsection (4) of this section."

28-24-104C. Audit of warranty claims. — A supplier may not audit a dealer's records with respect to any warranty claim submitted more than two (2) years before the date of the audit.

History.

I.C., § 28-24-104C, as added by 2005, ch. 238, § 9, p. 730.

28-24-104D. Arbitration. — Any party to a retailer agreement aggrieved by the conduct of the other party to the agreement under sections 28-23-101 through 28-23-111, Idaho Code, or under part 1, chapter 24, title 28, Idaho Code, may seek arbitration of the issues under sections 7-901 through 7-922, Idaho Code. Unless the parties agree to different arbitration rules, the arbitration shall be conducted in Idaho pursuant to the commercial arbitration rules of the American arbitration association. When the parties agree, the arbitration shall be the parties' only remedy and the findings and conclusions of the arbitrator or panel of arbitrators shall be binding upon both parties.

(1) The arbitrator or arbitrators may award the prevailing party:

- (a) The costs of witness fees and other fees in the case;
- (b) Reasonable attorney's fees; and
- (c) Injunctive relief against unlawful termination, cancellation, nonrenewal or change in competitive circumstances.

(2) Any retailer has a civil cause of action in district court in this state against a supplier for damages sustained by the retailer as a consequence of the supplier's violation of part 1, chapter 24, title 28, Idaho Code, or sections 28-23-101 through 28-23-111, Idaho Code, together with:

- (a) The actual costs of the action;
- (b) Reasonable attorney's fees; and
- (c) Injunctive relief against unlawful termination, cancellation, nonrenewal or change in competitive circumstances.

(3) No dealer shall be required to waive his rights to judicial recourse by contractual agreements through penalty of loss of trade discounts or changes in the competitive circumstances of the dealer by the supplier deemed to be punitive in nature or effect. The remedies set forth in this section are not exclusive and are in addition to any other remedies

permitted by law, unless the parties have mutually agreed to binding arbitration under this section.

History.

I.C., § 28-24-104D, as added by 2005, ch. 238, § 9, p. 730.

28-24-104E. Successors in interest. — The obligations of any supplier under this chapter are applied to any successor in interest or assignee of the supplier. A successor in interest includes any purchaser of assets or stock, any surviving corporation resulting from merger or liquidation, and any receiver or any trustee of the original supplier.

History.

I.C., § 28-24-104E, as added by 2005, ch. 238, § 9, p. 730.

28-24-105. Remedies and enforcement. — Monetary damages may be recovered for losses sustained as a consequence of any violation of the provisions of this chapter. Such recovery may also include a requirement that the supplier repurchase at fair market value any data processing hardware, software and specialized repair tools and equipment previously purchased from the supplier or approved vendor of the supplier pursuant to requirements of the supplier. Additionally, any judgment rendered by a court of competent jurisdiction for the plaintiff in a suit filed pursuant to this section may include damages in the amount of two (2) times the compensatory damages found due and owing. Injunctive relief may also be granted against any actual or threatened violation of the provisions of this chapter. In any action brought under this chapter the prevailing party shall be entitled to recover reasonable attorney's fees and costs. The remedies set forth in this section shall not be deemed exclusive and shall be in addition to any other remedies permitted by law. A person, firm or corporation which brings an action under this section must commence the action in the county in which the principal place of business of the retailer is located.

History.

I.C., § 28-24-105, as added by 1990, ch. 267, § 1, p. 750; am. 2005, ch. 238, § 10, p. 730; am. 2011, ch. 270, § 16, p. 730.

STATUTORY NOTES

Amendments.

The 2011 amendment, by ch. 270, added the third sentence.

28-24-106. Severability. — The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act.

History.

I.C., § 28-24-106, as added by 1990, ch. 267, § 1, p. 750.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1990, ch.

267, which is compiled as §§ 28-24-101 to 28-24-107.

28-24-107. Effective date — Application to agreements. — This act shall take effect on July 1, 1990, and shall apply to any dealer agreement then in effect which has no expiration date and which is a continuing agreement and all other dealer agreements entered into or renewed on or after such effective date.

History.

I.C., § 28-24-107, as added by 1990, ch. 267, § 1, p. 750.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1990, ch.

267, which is compiled as §§ 28-24-101 to 28-24-107.

28-24-108. Jurisdiction — Venue. — (1) The courts of this state shall have jurisdiction over any legal dispute between a wholesaler, manufacturer or distributor of farm implements or equipment, machinery, repair parts, stock parts and attachments located in or outside this state and an equipment dealer located in this state. The laws of the state of Idaho shall exclusively apply to such disputes.

(2) Venue for a dispute as provided in subsection (1) of this section shall be in the judicial district wherein the dealer's principal place of business is located.

History.

I.C., § 28-24-108, as added by 2011, ch. 270, § 17, p. 730.

CHAPTERS 25 — 30

[RESERVED]

CHAPTER 31

UNIFORM CONSUMER CREDIT CODE — GENERAL PROVISIONS AND DEFINITIONS

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

PART 3. DEFINITIONS

SECTION.

28-31-101 — 28-31-109. [Repealed.]

SECTION.

28-31-301 — 28-31-303. [Repealed.]

PART 2. SCOPE AND JURISDICTION

28-31-201, 28-31-202. [Repealed.]

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

28-31-101 — 28-31-109. Title — Purpose — Construction — Severability — Adjustment of dollar amounts — Waiver — Effect on powers of organizations. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised 1971, ch. 229, §§ 1.101 to 1.108, p. 1116; 1971, ch. 316, § 3, p. 1262; I.C., § 28-31-109, as added by

1977, ch. 16, § 1, p. 34; am. 1978, ch. 326, § 1, p. 821; am. 1979, ch. 225, § 1, p. 620, were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 2. SCOPE AND JURISDICTION

28-31-201, 28-31-202. Territorial application — Exclusions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised 1971, ch.

299, §§ 1.201, 1.202, p. 1116, were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 3. DEFINITIONS

28-31-301 — 28-31-303. Definitions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised from 1977, ch. 299, §§ 1.301 to 1.303, p. 1116; am. 1982,

ch. 324, § 1, p. 804, were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

CHAPTER 32

UNIFORM CONSUMER CREDIT CODE — CREDIT SALES

PART 1. GENERAL PROVISIONS

SECTION.

28-32-101 — 28-32-111. [Repealed.]

PART 2. MAXIMUM CHARGES

28-32-201 — 28-32-210. [Repealed.]

PART 3. DISCLOSURE AND ADVERTISING

28-32-301 — 28-32-313. [Repealed.]

PART 4. LIMITATIONS ON AGREEMENTS AND PRACTICES

SECTION.

28-32-401 — 28-32-416. [Repealed.]

PART 5. HOME SOLICITATION SALES

28-32-501 — 28-32-505. [Repealed.]

PART 6. SALES OTHER THAN CONSUMER CREDIT SALES

28-32-601 — 28-32-605. [Repealed.]

PART 1. GENERAL PROVISIONS

28-32-101 — 28-32-111. Title — Scope — Definitions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 2.101 to 2.111, p. 1116; am.

1973, ch. 106, § 1, p. 188; 1982, ch. 325, § 1, p. 806 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 2. MAXIMUM CHARGES

28-32-201 — 28-32-210. Credit service charge — Additional charges — Delinquency charges — Advances — Prepayment. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 2.201 to 2.210, p. 1116; 1973, ch. 8, § 1, p. 17; am. 1978, ch. 114, § 1,

p. 258; 1981, ch. 202, §§ 1, 2, p. 359, were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 3. DISCLOSURE AND ADVERTISING

28-32-301. Applicability — Information required. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which was compiled from 1971, ch. 299, § 2.301, p. 1116; am. 1982, ch.

324, § 2, p. 804 was repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

28-32-302 — 28-32-313. Disclosure requirements — Advertising. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 2.302 to 2.313, p. 1116 were

repealed by S.L. 1982, ch. 324, § 4 and S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 4. LIMITATIONS ON AGREEMENTS AND PRACTICES

28-32-401 — 28-32-416. Agreements and various practices — Limitation — Attorney's fees. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 2.401 to 2.416, p. 1116 were

repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 5. HOME SOLICITATION SALES

28-32-501 — 28-32-505. Home solicitation sales. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 2.501 to 2.505, p. 1116; am.

1973, ch. 91, §§ 1, 2, p. 157 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 6. SALES OTHER THAN CONSUMER CREDIT SALES

28-32-601 — 28-32-605. Sales subject to act by parties — Consumer related sales. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 2.601 to 2.605, p. 1116; am.

1981, ch. 202, § 3, p. 359 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

CHAPTER 33

UNIFORM CONSUMER CREDIT CODE — LOANS

PART 1. GENERAL PROVISIONS

SECTION.

28-33-101 — 28-33-109. [Repealed.]

PART 2. MAXIMUM CHARGES

28-33-201 — 28-33-210. [Repealed.]

PART 3. DISCLOSURE AND ADVERTISING

28-33-301 — 28-33-312. [Repealed.]

PART 4. LIMITATIONS ON AGREEMENTS AND PRACTICES

SECTION.

28-33-401 — 28-33-409. [Repealed.]

PART 5. REGULATED AND SUPERVISED LOANS

28-33-501 — 28-33-514. [Repealed.]

PART 6. LOANS OTHER THAN CONSUMER LOANS

28-33-601 — 28-33-604. [Repealed.]

PART 1. GENERAL PROVISIONS

28-33-101 — 28-33-109. Definitions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 3.101 to 3.109; am. 1973, ch.

113, §§ 1, 2, p. 205; am. 1979, ch. 34, § 3, p. 50 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 2. MAXIMUM CHARGES

28-33-201 — 28-33-210. Charges. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from

1971, ch. 299, §§ 3.201 to 3.210; am. 1973, ch. 7, § 1, p. 14; am. 1974, ch. 126, § 1, p. 1302;

am. 1978, ch. 113, § 1, p. 256; am. 1978, ch. 114, § 2, p. 258; am. 1980, ch. 319, § 1, p. 811; am. 1981, ch. 202, § 4, p. 359 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 3. DISCLOSURE AND ADVERTISING

28-33-301. Applicability — Information required. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which was compiled as 1971, ch. 299, § 3.301, p. 1116; am. 1977, ch. 201,

§ 1, p. 550; am. 1981, ch. 178, § 1, p. 312; am. 1982, ch. 324, § 3, p. 804 was repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

28-33-302 — 28-33-312. Disclosure requirements — Advertising. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 3.302 to 3.312, p. 1116 were

repealed by S.L. 1982, ch. 324, § 4 and 1983, ch. 119, § 1 and § 28-49-106.

PART 4. LIMITATIONS ON AGREEMENTS AND PRACTICES

28-33-401 — 28-33-409. Agreements and practices — Limitations. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 3.401 to 3.409, p. 1116; am.

1976, ch. 222, § 1, p. 795; 1982, ch. 175, § 1, p. 463 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 5. REGULATED AND SUPERVISED LOANS

28-33-501 — 28-33-514. Regulated and supervised loans. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 3.502 to 3.514; 1971, ch. 316, § 2, p. 1262; am. 1974, ch. 153, § 1, p.

1378; am. 1978, ch. 41, § 1, p. 71; am. 1981, ch. 202, §§ 5, 6, p. 359 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 6. LOANS OTHER THAN CONSUMER LOANS

28-33-601 — 28-33-604. Loans subject to act by agreement of parties — Consumer related loans. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from

1971, ch. 299, §§ 3.601 to 3.604 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

CHAPTER 34**UNIFORM CONSUMER CREDIT CODE — INSURANCE****PART 1. INSURANCE IN GENERAL****SECTION.****28-34-101 — 28-34-111. [Repealed.]****PART 2. CONSUMER CREDIT INSURANCE****28-34-201 — 28-34-203. [Repealed.]****PART 3. PROPERTY AND LIABILITY INSURANCE****28-34-301 — 28-34-304. [Repealed.]****PART 4. INSURANCE PURSUANT TO A PREMIUM
FINANCE LOAN****SECTION.****28-34-401. Cancellation of insurance pursuant to a premium finance loan. [Repealed.]****PART 1. INSURANCE IN GENERAL****28-34-101 — 28-34-111. Definitions — Maximum charges — Refund or credit — Existing insurance. [Repealed.]****STATUTORY NOTES****Compiler's Notes.**

These sections, which were compiled from 1971, ch. 299, §§ 4.101 to 4.111, p. 1116; am.

1974, ch. 24, §§ 39-42, p. 744; 1974, ch. 152, § 1, p. 1375 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 2. CONSUMER CREDIT INSURANCE**28-34-201 — 28-34-203. Consumer credit insurance — Term — Amount — Filing — Approval of rates and forms. [Repealed.]****STATUTORY NOTES****Compiler's Notes.**

These sections, which were compiled from 1971, ch. 299, §§ 4.201 to 4.203, p. 1116; am.

1972, ch. 369, § 1, p. 1074; am. 1974, ch. 24, § 43, p. 744 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 3. PROPERTY AND LIABILITY INSURANCE**28-34-301 — 28-34-304. Property and liability insurance. [Repealed.]****STATUTORY NOTES****Compiler's Notes.**

These sections, which were compiled from 1971, ch. 299, §§ 4.301 to 4.304, p. 1116; am.

1974, ch. 24, § 44, p. 744; am. 1977, ch. 142, § 13, p. 303 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 4. INSURANCE PURSUANT TO A PREMIUM FINANCE LOAN

28-34-401. Cancellation of insurance pursuant to a premium finance loan. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which was compiled from

1971, ch. 299, § 4.401, p. 1116 was repealed
by S.L. 1983, ch. 119, § 1 and § 28-49-106.

CHAPTER 35

**UNIFORM CONSUMER CREDIT CODE — REMEDIES
AND PENALTIES**

PART 1. LIMITATIONS ON CREDITORS' REMEDIES

SECTION.

28-35-101 — 28-35-108. [Repealed.]

PART 2. DEBTORS' REMEDIES

28-35-201 — 28-35-205. [Repealed.]

PART 3. CRIMINAL PENALTIES

SECTION.

28-35-301, 28-35-302. [Repealed.]

PART 1. LIMITATIONS ON CREDITORS' REMEDIES

28-35-101 — 28-35-108. Creditors' remedies — Limitation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from

1971, ch. 299, §§ 5.101 to 5.108 were repealed
by S.L. 1983, ch. 119, § 1 and § 28-49-106.

PART 2. DEBTORS' REMEDIES

28-35-201 — 28-35-205. Interests in land — Effect of violation of rights of parties — Civil liability for violation of disclosure provisions — Debtor's right to rescind certain transactions — Refunds and penalties as set-off to obligation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.These sections, which were compiled from
1971, ch. 299, §§ 5.201 to 5.205, p. 1116; am.1978, ch. 136, § 1, p. 310; am. 1979, ch. 49,
§ 1, p. 139 were repealed by S.L. 1983, ch.
119, § 1 and § 28-49-106.

PART 3. CRIMINAL PENALTIES

**28-35-301, 28-35-302. Willful violations — Disclosure violations.
[Repealed.]**

STATUTORY NOTES

Compiler's Notes.

These sections, which were compiled from 1971, ch. 299, §§ 5.301, 5.302, p. 1116 were

repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

CHAPTER 36

IDAHO LEASE-PURCHASE AGREEMENT ACT

PART 1. POWERS AND FUNCTIONS OF
ADMINISTRATORS

SECTION.

28-36-101. Short title and purpose.

28-36-102. Definitions.

28-36-103. Inapplicability of other laws —
Exempted transactions.

28-36-104. General requirements of disclosure.

SECTION.

28-36-105. Disclosures.

28-36-106. Prohibited practices.

28-36-107. Reinstatement.

28-36-108. Receipts and accounts.

28-36-109. Renegotiations.

28-36-110. Advertising.

28-36-111. Enforcement.

28-36-112 — 28-36-116. [Repealed.]

28-36-201 — 28-36-203. [Repealed.]

PART 1. POWERS AND FUNCTIONS OF ADMINISTRATORS

28-36-101. Short title and purpose. — This act shall be known and may be cited as the "Idaho Lease-Purchase Agreement Act." The purpose of this act is to protect both consumers and businesses engaged in the lease-purchase of consumer goods against unfair or deceptive acts and practices, to provide certainty and regularity in the conduct of these transactions, and to provide efficient and economical procedures to secure such protection.

History.

I.C., § 28-36-101, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former §§ 28-36-101 to 28-36-111 which were compiled from 1971, ch. 299, §§ 6-101 to 6-111; am. 1974, ch. 24, § 45, p. 744; 1978, ch. 41, § 2, p. 71 were repealed by S.L. 1983, ch. 119, § 1 and § 28-49-106.

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 232, which is compiled as §§ 28-36-101 to 28-36-111.

28-36-102. Definitions. — As used in this chapter:

(1) "Advertisement" means a commercial message in any medium that promotes, directly or indirectly, a lease-purchase agreement.

(2) "Consumer" means a natural person who rents personal property under a lease-purchase agreement to be used by the consumer primarily for personal, family or household purposes.

(3) "Consummation" means the time a consumer enters a lease-purchase agreement.

(4) "Lessor" means a person who regularly provides the use of property through lease-purchase agreements and to whom lease payments are initially payable on the face of the lease-purchase agreement.

(5) "Lease-purchase agreement" means an agreement by a lessor and a consumer for the use of personal property by a consumer primarily for personal, family or household purposes, for an initial period of four (4) months or less that is automatically renewable with each payment after the initial period, but does not obligate or require the consumer to continue leasing or using the property beyond the initial period, and that permits the consumer to become the owner of the property.

(6) "Renewal date" means the date specified in the lease-purchase agreement upon which the consumer must either return the personal property to the lessor or renew the lease-purchase agreement.

History.

I.C., § 28-36-102, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-102 was repealed. See Prior Laws, § 28-36-101.

JUDICIAL DECISIONS

ANALYSIS

Construction with other statutes.

Rent-to-own agreements.

Construction with Other Statutes.

Lease-purchase agreements qualifying under subsection (5) of this section are not subject to the "true lease" versus "disguised credit sale" debate which flows under the definition of "security interest" in § 28-1-201. In re Stellman, 237 Bankr. 759 (Bankr. D. Idaho 1999).

use of personal property by an individual for household purposes, for an initial period of four months or less, renewable after the initial period, and permitting, but not obligating, the lessee to become owner of the property, the agreement was within the scope of the statute. In re Stellman, 237 Bankr. 759 (Bankr. D. Idaho 1999).

Rent-to-Own Agreements.

Where a rent-to-own agreement was for the

28-36-103. Inapplicability of other laws — Exempted transactions. — (1) Lease-purchase agreements are not governed by the laws relating to:

- (a) A home solicitation sale as defined in section 28-43-401, et seq., Idaho Code;
 - (b) A regulated consumer credit transaction pursuant to section 28-41-101, et seq., Idaho Code; or
 - (c) A security interest as defined in section 28-1-201, Idaho Code.
- (2) This chapter does not apply to the following:
- (a) Leases of personal property primarily for business, commercial or

agricultural purposes, or those made with governmental agencies or instrumentalities or with organizations;

(b) A lease of a safe deposit box;

(c) A lease or bailment of personal property which is incidental to the lease of real property, and which provides that the consumer has no option to purchase the leased property; or

(d) A lease of an automobile.

History.

I.C., § 28-36-103, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-103 was repealed. See Prior Laws, § 28-36-101.

JUDICIAL DECISIONS

Construction with Other Statutes.

Subsection 1(c) of this section states that the laws relating to security interests as defined in § 28-1-201 do not apply to lease-purchase agreements, but since it does not purport to repeal that section, but only to

make the Lease-Purchase Agreement Act, § 28-36-101 et seq., inapplicable to certain contracts, the provisions are not irreconcilably in conflict. In re Stelman, 237 Bankr. 759 (Bankr. D. Idaho 1999).

28-36-104. General requirements of disclosure. — (1) The lessor shall disclose, or cause to be disclosed, to the consumer the information required in this chapter. In a transaction involving more than one (1) lessor, only one (1) lessor need make the disclosures, but all lessors shall be bound by such disclosures.

(2) The disclosures shall be made at or before consummation of the lease-purchase agreement.

(3) The disclosures shall be made clearly and conspicuously in writing and a copy of the lease-purchase agreement provided to the consumer. The disclosures required under section 28-36-105(1), Idaho Code, shall be made on the face of the contract above the line for the consumer's signature.

(4) If a disclosure becomes inaccurate as the result of any act, occurrence or agreement by the consumer after delivery of the required disclosures, the resulting inaccuracy is not a violation of the provisions of this chapter.

History.

I.C., § 28-36-104, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-104 was repealed. See Prior Laws, § 28-36-101.

JUDICIAL DECISIONS**Legislative Intent.**

The legislature has recognized lease-purchase agreements as legitimate consumer contracts and has declared that they are en-

forceable provided certain disclosures are made. In *re* Stellman, 237 Bankr. 759 (Bankr. D. Idaho 1999).

28-36-105. Disclosures. — (1) For each lease-purchase agreement, the lessor shall disclose in the agreement the following items, as applicable:

- (a) The total number, total dollar amount and frequency of all payments necessary to acquire ownership of the property;
- (b) A statement that the consumer will not own the property until the consumer has made the total payments necessary to acquire ownership;
- (c) A statement that the consumer is responsible to the lessor for the fair market value of the property if, and as of the time, it is lost, stolen, damaged or destroyed;
- (d) A brief description of the leased property, sufficient to identify the property to the consumer and the lessor, including an identification number, if applicable, and a statement indicating whether the property is new or used, but a statement that indicates new property is used is not a violation of the provisions of this chapter;
- (e) The total amount initially payable or required at or before consummation of the agreement or delivery of the property, whichever is later;
- (f) A statement that the total of payments necessary to acquire ownership does not include other charges, such as late payment, default, pickup and reinstatement fees, which fees shall be separately disclosed in the agreement;
- (g) A statement clearly summarizing the terms of the consumer's option to purchase, if any, including a statement regarding whether the consumer has the right to exercise an early purchase option and the price, formula or method for determining the price at which the property may be so purchased;
- (h) A statement identifying the party responsible for maintaining or servicing the property while it is being leased, together with a description of that responsibility, and a statement that if any part of a manufacturer's express warranty covers the lease property at the time the consumer acquires ownership of the property, the warranty shall be transferred to the consumer, if allowed by the terms of the warranty;
- (i) The consummation date of the agreement and the identities of the lessor and consumer;
- (j) A statement that the consumer may terminate the agreement without penalty by voluntarily surrendering or returning the property in good repair upon the renewal date together with any past due rental payments; and
- (k) Notice of the right to reinstate an agreement as herein provided.

History.

I.C., § 28-36-105, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-105 was repealed. See Prior Laws, § 28-36-101.

Compiler's Notes.

This section was enacted with a subsection (1), but no subsection (2).

28-36-106. Prohibited practices. — A lease-purchase agreement may not contain:

- (1) A confession of judgment;
- (2) A negotiable instrument;
- (3) A claim of a property interest in any goods except those goods delivered by the lessor pursuant to the lease-purchase agreement;
- (4) A wage assignment;
- (5) A waiver by the consumer of claims or defenses; or
- (6) A provision authorizing the lessor or a person acting on the lessor's behalf to enter upon the consumer's premises without consent, or to commit any breach of the peace in the repossession of goods.

History.

I.C., § 28-36-106, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-106 was repealed. See Prior Laws, § 28-36-101.

28-36-107. Reinstatement. — (1) A consumer who fails to make a timely rental payment and who fails to voluntarily return or surrender the leased property on or before the renewal date, may reinstate the agreement without losing any rights or options which exist under the agreement, by the payment, within five (5) days after the renewal date, if the consumer pays monthly, or within two (2) days after the renewal date, if the consumer pays more frequently than monthly, of:

- (a) All past due rental charges;
- (b) If the property has been picked up, the pickup and delivery fees; and
- (c) Any applicable reinstatement fee and default fee as set forth in the lease-purchase agreement.

(2) A consumer who voluntarily returned or surrendered the property on or before the renewal date, other than through judicial process, and is current in all payments due under the lease agreement on the renewal date, may reinstate the agreement without losing any rights or options which exist under the agreement:

- (a) During a period of not less than twenty-one (21) days after the date of the return of the property if at the time of surrender or voluntary return of the property the consumer had paid less than two-thirds (2/3) of the total of payments necessary to acquire ownership; or
- (b) During a period of not less than forty-five (45) days after the date of the return of the property if at the time of surrender or voluntary return of the property the consumer had paid two-thirds (2/3) or more of the total of payments necessary to acquire ownership.

(3) Nothing in this section shall prevent a lessor from attempting to repossess property during the reinstatement period.

(4) Upon reinstatement, the lessor shall provide the consumer with the same property or substitute property of comparable quality and condition.

History.

I.C., § 28-36-107, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-107 was repealed. See Prior Laws, § 28-36-101.

28-36-108. Receipts and accounts. — The lessor shall provide the consumer a written receipt for each payment made by cash or money order.

History.

I.C., § 28-36-108, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-108 was repealed. See Prior Laws, § 28-36-101.

28-36-109. Renegotiations. — A renegotiation shall occur when an existing lease-purchase agreement is replaced by a new agreement entered into by the same lessor and consumer. A renegotiation shall be considered a new agreement requiring new disclosures. However, the following events shall not be treated as renegotiations and shall not require new disclosures:

(1) The additions [addition] or return of property in a multiple-item agreement or the substitution of the lease property, if in either case the average payment allocable to a payment period is not changed by more than twenty-five percent (25%);

(2) A deferral or extension of one (1) or more periodic payments, or portions of a periodic payment;

(3) A reduction in charges in the lease or agreement; or

(4) A lease or agreement modified in a court proceeding.

History.

I.C., § 28-36-109, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-109 was repealed. See Prior Laws, § 28-36-101.

was added by the compiler to supply the probable intended term.

Compiler's Notes.

The bracketed insertion in subsection (1)

28-36-110. Advertising. — (1) If an advertisement for a lease-purchase agreement refers to or states the dollar amount of the rental payment and the right to acquire ownership for any one (1) specific item, then in respect to that item the advertisement shall also clearly and conspicuously state the following items, as applicable:

- (a) That the transaction advertised is a lease-purchase agreement;
- (b) The total of payments necessary to acquire ownership; and
- (c) That the consumer acquires no ownership rights if the total amount necessary to acquire ownership is not paid.

(2) No owner or personnel of any medium in which an advertisement appears or through which it is disseminated shall be liable under this section.

(3) The provisions of subsection (1) of this section shall not apply to an advertisement which does not refer to or state the dollar amount of any payment, or which is published in a telephone directory, or in any similar business directory.

History.

I.C., § 28-36-110, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 28-36-110 was repealed. See Prior Laws, § 28-36-101.

28-36-111. Enforcement. — (1) A lessor whose violation of the provisions of this chapter causes damages to a consumer shall be subject to a judgment by a court of competent jurisdiction for actual damages, if the lessor can show by preponderance of the evidence that the damage was caused by a good faith dispute between the parties; or for actual damages or one thousand dollars (\$1,000), whichever is greater, in the event the violation is not a result of a good faith dispute between the parties.

(2) As a condition precedent to bringing any action for the collection of a penalty pursuant to this section, the consumer must give the lessor written notice of the violation or violations alleged twenty (20) days prior to filing such action.

(3) No action under the provisions of this section may be brought in any court of competent jurisdiction more than one (1) year after the date of the consumer's last payment under the lease-purchase agreement or more than one (1) year after the date of the occurrence of the violation that is the subject of the suit, whichever is later.

History.

I.C., § 28-36-111, as added by 1993, ch. 232, § 1, p. 807.

STATUTORY NOTES**Prior Laws.**

Former § 28-36-111 was repealed. See
Prior Laws, § 28-36-101.

28-36-112 — 28-36-116. Enforcement orders. [Repealed.]**STATUTORY NOTES****Compiler's Notes.**

These sections, which were compiled from
1971, ch. 299, §§ 6.112 to 6.116, p. 1116 were

repealed by S.L. 1983, ch. 119, § 1 and § 28-
49-106.

28-36-201 — 28-36-203. Notification — Fees. [Repealed.]**STATUTORY NOTES****Compiler's Notes.**

These sections, which were compiled from
1971, ch. 299, §§ 6.201 to 6.203, p. 1116; am.

1976, ch. 40, § 1, p. 86 were repealed by S.L.
1983, ch. 119, § 1 and § 28-49-106.

CHAPTERS 37, 38**[RESERVED]****CHAPTER 39****EFFECTIVE DATE AND REPEALER****SECTION.**

28-39-101, 28-39-102. [Repealed.]
28-39-103 — 28-39-107. [Reserved.]

SECTION.

28-39-108. Chapter 22, title 26 unaffected.
[Repealed.]

**28-39-101, 28-39-102. Time of taking effect — Continuation of li-
censing. [Repealed.]****STATUTORY NOTES****Compiler's Notes.**

These sections, which were compiled from
1971, ch. 299, §§ 9.101, 9.102, p. 1116 were

repealed by S.L. 1983, ch. 119, § 1 and § 28-
49-106.

28-39-103 — 28-39-107. [Reserved.]**28-39-108. Chapter 22, title 26 unaffected. [Repealed.]****STATUTORY NOTES****Compiler's Notes.**

This section, which was compiled from

1971, ch. 299, § 9.108, p. 1116 was repealed
by S.L. 1983, ch. 119, § 1 and § 28-49-106.

CHAPTER 40

[RESERVED]

CHAPTER 41

GENERAL PROVISIONS AND DEFINITIONS

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

SECTION.

28-41-108. Transactions subject to act by agreement.

SECTION.

28-41-101. Short title.

28-41-102. Purposes — Rules of construction.

28-41-103. Supplementary general principles of law applicable.

28-41-104. Construction against implicit repeal.

28-41-105. Severability.

28-41-106. Waiver — Agreement to forego [forgo] rights — Settlement of claims.

28-41-107. Effect of act on powers of organizations.

PART 2. SCOPE AND JURISDICTION

28-41-201. Territorial application.

28-41-202. Exclusions.

28-41-203. Jurisdiction.

28-41-204. Applicability.

PART 3. DEFINITIONS

28-41-301. General definitions.

28-41-302. Federal consumer credit protection act — Defined.

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

28-41-101. Short title. — This act shall be known and may be cited as the “Idaho Credit Code.”

History.

I.C., § 28-41-101, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Compiler's Notes.

The term “this act” refers to S.L. 1983, ch.

119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

JUDICIAL DECISIONS

Cited in: Security Pac. Fin. Corp. v. Bishop, 109 Idaho 25, 704 P.2d 357 (Ct. App. 1985).

28-41-102. Purposes — Rules of construction. — (1) This act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this act are:

(a) To simplify, clarify and modernize the law governing installment sales, credit, loans and usury;

(b) To further understanding of the terms of credit transactions and to foster competition among suppliers of credit so that debtors may obtain credit at reasonable cost;

- (c) To protect debtors against unfair practices by some suppliers of credit, having due regard for the interests of legitimate and scrupulous creditors;
 - (d) To permit and encourage the development of fair and economically sound credit practices; and
 - (e) To conform the regulation of those credit transactions to the policies of the Federal Consumer Credit Protection Act, where applicable.
- (3) A reference to a requirement imposed by this act includes reference to a related rule of the administrator adopted pursuant to this act.

History.

I.C., § 28-41-102, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Federal References.**

The federal Consumer Credit Protection Act, referred to in paragraph (2)(e) of this section, is compiled as 15 U.S.C.S. § 1601 et seq.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

28-41-103. Supplementary general principles of law applicable. — Unless displaced by the particular provisions of this act, the Uniform Commercial Code and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement the provisions of this act.

History.

I.C., § 28-41-103, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

The Uniform Commercial Code, referred to in this section, is compiled as § 28-1-101 et seq.

28-41-104. Construction against implicit repeal. — This act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

History.

I.C., § 28-41-104, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 1983, ch.

119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

28-41-105. Severability. — If any provision of this act or the applica-

tion thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

History.

I.C., § 28-41-105, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 1983, ch.

119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

28-41-106. Waiver — Agreement to forego [forgo] rights — Settlement of claims. — (1) Except as otherwise provided in this act, a debtor may not waive or agree to forego [forgo] rights or benefits under this act.

(2) A claim by a debtor against a creditor for an excess charge, other violation of this act, or civil penalty, or a claim against a debtor for default or breach of a duty imposed by this act, if disputed in good faith, may be settled by agreement.

(3) A claim, whether or not disputed, against a debtor may be settled for less value than the amount claimed.

(4) A settlement in which the debtor waives or agrees to forego [forgo] rights or benefits under this act is invalid if the court, as a matter of law, finds the settlement to have been unconscionable at the time it was made. The competence of the debtor, any deception or coercion practiced upon him, the nature and extent of the legal advice received by him, and the value of the consideration are relevant to the issue of unconscionability.

(5) Title 41, Idaho Code, shall not apply to an agreement by a creditor or lessor, with or without consideration, to forgive or waive all or any part of a debt or lease obligation following a partial or total loss of the property that is the subject of a loan, credit sale or lease transaction and the forgiveness shall not be considered the transaction of insurance for the purposes of the Idaho credit code.

History.

I.C., § 28-41-106, as added by 1983, ch. 119, § 3, p. 264; am. 2000, ch. 175, § 1, p. 443.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

The bracketed insertions in the section heading and in paragraphs (1) and (4) were added by the compiler to provide the intended term.

JUDICIAL DECISIONS

Cited in: Irwin Rogers Ins. Agency, Inc. v. Murphy, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

28-41-107. Effect of act on powers of organizations. — (1) This act prescribes maximum charges for all creditors, except those excluded under section 28-41-202, Idaho Code, extending credit as a regular business, including regulated credit sales, as defined in section 28-41-301, Idaho Code, and regulated loans, as defined in section 28-41-301, Idaho Code, and displaces existing limitations on the powers of those creditors based on maximum charges, except in insurance matters as prescribed by rule of the department of insurance.

(2) With respect to sellers of goods or services, small loan companies, licensed lenders, finance companies, sales finance companies, industrial banks and loan companies, and commercial banks, this act displaces existing limitations on their powers based solely on amount or duration of credit, except the insurance matters as prescribed by rule of the department of insurance.

(3) Except as provided in subsection (1) of this section, this act does not displace limitations on powers of credit unions, savings banks, savings and loan associations, or other thrift institutions whether organized for the profit of shareholders or as mutual organizations.

(4) Except as provided in subsections (1) and (2) of this section, this act does not displace:

(a) Limitations on powers of supervised financial organizations, as defined in section 28-41-301, Idaho Code, with respect to the amount of a loan to a single borrower, the ratio of the loan to the value of collateral, the duration of a loan secured by an interest in land, or other similar restrictions designed to protect deposits; or

(b) Limitations on powers an organization is authorized to exercise under the laws of this state or the United States.

(5) Notwithstanding the provisions of chapter 1, title 57, Idaho Code, and chapter 27, title 67, Idaho Code, any supervised financial organization which intentionally fails to comply with the provisions of this act shall not be entitled to receive deposits from state or public depositing units.

History.

I.C., § 28-41-107, as added by 1983, ch. 119, § 3, p. 264; am. 2013, ch. 54, § 9, p. 108.

STATUTORY NOTES

Cross References.

Department of insurance, § 41-201 et seq.

following “prescribed by rule” near the end of subsections (1) and (2).

Amendments.

The 2013 amendment, by ch. 54, corrected two outdated references to section 28-41-301 in subsection (1) and one such reference in paragraph (4)(a) and deleted “or regulation”

Compiler’s Notes.

The term “this act” refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

28-41-108. Transactions subject to act by agreement. — Parties to a credit transaction or modification thereof that is not a regulated consumer credit transaction, as defined in section 28-41-301, Idaho Code, may agree in a writing signed by them that the transaction is subject to the provisions of this act applying to regulated consumer credit transactions. If the parties so

agree, the transaction is a regulated consumer credit transaction for the purposes of this act.

History.

I.C., § 28-41-108, as added by 1983, ch. 119, § 3, p. 264; am. 2013, ch. 54, § 10, p. 108.

STATUTORY NOTES**Amendments.**

The 2013 amendment, by ch. 54, substituted “as defined in” for “subsection (33) of” near the middle of the first sentence.

Compiler’s Notes.

The term “this act” refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

PART 2. SCOPE AND JURISDICTION

28-41-201. Territorial application. — (1) Except as otherwise provided in this section, this act applies to sales and loans made in this state and to modifications, including refinancings, consolidations, and deferrals, made in this state, of sales and loans, wherever made. For purposes of this act a sale, loan, or modification of a sale or loan is made in this state if:

(a) A written agreement evidencing the obligation or offer of the consumer is received by the creditor in this state; or

(b) A consumer who is a resident of this state enters into the transaction with a creditor who has solicited or advertised in this state by any means including, but not limited to, mail, brochure, telephone, print, radio, television, internet or any other electronic means.

(2) Notwithstanding subsection (1)(b) of this section, unless made subject to this act by agreement of the parties, a sale, loan, or modification of a sale or loan is not made in this state if a resident of this state enters into the transaction while physically present in another state.

(3) The part on limitations on creditors’ remedies, part 1 of the chapter on remedies and penalties, chapter 45, title 28, Idaho Code, applies to actions or other proceedings brought in this state to enforce rights arising from regulated credit sales or regulated loans, or extortionate extensions of credit, wherever made.

(4) If a regulated credit sale or regulated loan, or modification thereof, is made in another state to a person who is a resident of this state when the sale, loan, or modification is made, the following provisions apply as though the transaction occurred in this state:

(a) A seller, lender, or assignee of his rights, may not collect charges through actions or other proceedings in excess of those permitted by the chapter on finance charges and related provisions [chapter 42, title 28, Idaho Code]; and

(b) A seller, lender, or assignee of his rights, may not enforce rights against the buyer or debtor, with respect to the provisions of agreements which violate the provisions on limitations on agreements and practices, part 3 of chapter 43, title 28, Idaho Code.

(5) Except as provided in subsection (3) of this section, a sale, loan, or modification thereof, made in another state to a person who was not a

resident of this state when the sale, loan or modification was made is valid and enforceable according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

(6) For the purposes of this act, the residence of a buyer or debtor is the address given by him as his residence in any writing signed by him in connection with a credit transaction. Until he notifies the creditor of a new or different address, the given address is presumed to be unchanged.

(7) Notwithstanding other provisions of this section:

(a) Except as provided in subsection (3) of this section, this act does not apply if the buyer or debtor is not a resident of this state at the time of a credit transaction and the parties then agree that the law of his residence applies; and

(b) This act applies if the buyer or debtor is a resident of this state at the time of a credit transaction and the parties then agree that the law of this state applies.

(8) Except as provided in subsection (7) of this section, the following agreements by a buyer or debtor are invalid with respect to regulated credit sales, regulated loans, or modifications thereof, to which this act applies:

(a) That the law of another state shall apply;

(b) That the buyer or debtor consents to the jurisdiction of another state; and

(c) That fixes venue.

(9) Notwithstanding any other provision in this section, any person who, in this state, advertises, offers or solicits to make a loan for a consumer purpose, or arranges a payday loan for a third party lender, is engaging in business in this state for which a license is required under the Idaho credit code, unless exempt pursuant to section 28-46-301, Idaho Code.

History.

I.C., § 28-41-201, as added by 1983, ch. 119, § 3, p. 264; am. 2002, ch. 301, § 1, p. 858;

am. 2006, ch. 122, § 1, p. 340; am. 2013, ch. 54, § 1, p. 108.

STATUTORY NOTES

Amendments.

The 2006 amendment, by ch. 122, deleted former subsection (9), which read: "(9) The following provisions of this act specify the applicable law governing certain cases:

"(a) Applicability, section 28-46-102, Idaho Code, of the part on powers and functions of administrator, part 1, of the chapter on administration, chapter 46, title 28, Idaho Code; and

"(b) Applicability, section 28-46-201, Idaho Code, of the part on notification and fees, part 2, of the chapter on administration, chapter 46, title 28, Idaho Code."

The 2013 amendment, by ch. 54, added subsection (9).

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

The bracketed insertion at the end of paragraph (4)(a) was added by the compiler to supply a statutory citation to the referenced chapter.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-41-202. Exclusions. — This act does not apply to:

(1) Extensions of credit to government or governmental agencies or instrumentalities;

(2) The sale of insurance by an insurer, except as otherwise provided in the chapter on insurance, chapter 44, title 28, Idaho Code;

(3) Transactions under public utility or common carrier tariffs if a subdivision or agency of this state or of the United States regulates the charges for the service involved, the charges for delayed payment, and any discount allowed for early payment; or

(4) The rates and charges and the disclosure of rates and charges of a licensed pawnbroker established in accordance with a statute or ordinance concerning these matters.

History.

I.C., § 28-41-202, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

JUDICIAL DECISIONS

Cited in: Irwin Rogers Ins. Agency, Inc. v. Murphy, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

28-41-203. Jurisdiction. — The courts of this state may exercise jurisdiction over any creditor with respect to any conduct of the creditor subject to this act or with respect to any claim arising from a transaction subject to this act.

History.

I.C., § 28-41-203, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

28-41-204. Applicability. — This act shall apply only to credit transactions for a consumer purpose, except for the following parts, chapters and sections, which shall apply to credit transactions for any and all purposes:

- (1) Part 1, chapter 41, title 28, Idaho Code;
- (2) Section 28-41-202, Idaho Code;
- (3) Section 28-41-203, Idaho Code;
- (4) Section 28-41-204, Idaho Code;
- (5) Part 3, chapter 41, title 28, Idaho Code;
- (6) Part 2, chapter 42, title 28, Idaho Code;
- (7) Section 28-42-308, Idaho Code;
- (8) Part 4, chapter 42, title 28, Idaho Code;
- (9) Section 28-45-109, Idaho Code; and
- (10) Chapter 49, title 28, Idaho Code.

No provisions of this act other than those specified in subsections (1) through (10) of this section shall limit, expand or otherwise affect the powers, rights, duties or obligations of creditors or debtors in credit transactions for a business purpose.

History.

I.C., § 28-41-204, as added by 1983, ch. 119, § 3, p. 264; am. 1994, ch. 185, § 5, p. 603.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

emergency and provided this act shall be in full force and effect on and after March 25, 1994, and retroactively to July 1, 1993. Approved March 25, 1994.

Effective Dates.

Section 6 of S.L. 1994, ch. 185, declared an

PART 3. DEFINITIONS

28-41-301. General definitions. — (1) "Actuarial method" means the method, defined by rules adopted by the administrator, of allocating payments made on a debt between principal or amount financed and loan finance charge or credit service charge pursuant to which a payment is applied first to the accumulated loan finance charge or credit service charge and the balance is applied to the unpaid principal or unpaid amount financed.

(2) "Administrator" means the administrator designated in section 28-46-103, Idaho Code.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.

(4) "Agricultural purpose" means a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures the agricultural products. "Agricultural products" includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(5) "Amount financed" means the total of the following items:

(a) In the case of a sale, the cash price of the goods, services, or interest in land, less the amount of any down payment made in cash or in property traded in, and the amount actually paid or to be paid by the seller pursuant to an agreement with the buyer to discharge a security interest in, a lien on, or a debt with respect to property traded in;

(b) In case of a loan, the net amount paid to, receivable by, or paid or payable for the account of the debtor, plus the amount of any discount excluded from the finance charge, paragraph (b)(iii) of subsection (18); and

(c) In the case of a loan, to the extent that payment is, or payments are, deferred and the amount is not otherwise included and is authorized and disclosed to the debtor as required by law, amounts actually paid or to be paid by the creditor for registration, certificate of title, or license fees.

(6) "Billing cycle" means the time interval between periodic billing statement dates.

(7) "Business purpose" means any purpose except a consumer purpose. For purposes of this act, a credit transaction:

(a) Engaged in by a debtor for an agricultural purpose; or

(b) Engaged in by a debtor for an investment purpose; or

(c) Creating a debt secured by a first mortgage or first deed of trust on real property; or

(d) In which the debtor is an organization, rather than a natural person; is considered to be for a business purpose.

(8) "Card issuer" means a person who issues a credit card.

(9) "Cardholder" means a person to whom a credit card is issued or who has agreed with the card issuer to pay obligations arising from the issuance to or use of the card by another person.

(10) "Cash price" means the price of goods, services, or an interest in land at which the goods, services, or interest in land are offered for sale by the seller to cash buyers in the ordinary course of business, except as the administrator may otherwise prescribe by rule, and may include:

(a) Applicable sales, use, and excise and documentary stamp taxes;

(b) The cash price of accessories or related services such as delivery, installation, servicing, repairs, alterations, and improvements; and

(c) Amounts actually paid or to be paid by the seller for registration, certificate of title, or license fees.

The cash price stated by the seller to the buyer pursuant to the provisions on disclosure, part 2 of chapter 43, title 28, Idaho Code, is presumed to be the cash price.

(11) "Conspicuous" means a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. Whether a term or clause is conspicuous or not is for decision by the court.

(12) "Consumer purpose" means primarily a personal, family or household purpose. For purposes of this act, consumer purpose does not include a credit transaction:

(a) Engaged in by a debtor for an agricultural purpose; or

(b) Engaged in by a debtor for an investment purpose; or

(c) Creating a debt secured by a first mortgage or first deed of trust on real property; or

(d) In which the debtor is an organization, rather than a natural person.

(13) "Credit" means the right granted by a creditor to a debtor to defer payment of debt, to incur debt and defer its payment, or to purchase property or services and defer payment therefor.

(14) "Credit card" means a card or device issued under an arrangement pursuant to which a card issuer gives to a cardholder the privilege of obtaining credit from the card issuer or other person in purchasing or

leasing property or services, obtaining loans, or otherwise. A transaction is “pursuant to a credit card” only if credit is obtained according to the terms of the arrangement by transmitting information contained on the card or device orally, in writing, by mechanical or electronic methods, or in any other manner. A transaction is not “pursuant to a credit card” if the card or device is used solely in that transaction to:

- (a) Identify the cardholder or evidence his credit-worthiness and credit is not obtained according to the terms of the arrangement;
- (b) Obtain a guarantee of payment from the cardholder’s deposit account, whether or not the payment results in a credit extension to the cardholder by the card issuer; or
- (c) Effect an immediate transfer of funds from the cardholder’s deposit account by electronic or other means, whether or not the transfer results in a credit extension to the cardholder by the card issuer.

(15) “Creditor” means the person who grants credit in a regulated credit transaction or, except as otherwise provided, an assignee of a creditor’s right to payment, but use of the term does not itself impose on an assignee any obligation of his assignor. In case of credit granted pursuant to a credit card, “creditor” means the card issuer and not another person honoring the credit card.

(16) “Debtor” means the person to whom credit is granted in a regulated credit transaction.

(17) “Earnings” means compensation paid or payable by an employer to an employee, or for his account, for personal services rendered or to be rendered by him, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension, retirement, or disability program.

(18) “Finance charge”:

(a) Except as provided in paragraph (b) of this subsection, “finance charge” means the sum of any of the following types of charges payable directly or indirectly by the debtor and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, as applicable:

- (i) Interest or any amount payable under a point, discount, or other system of charges, however denominated;
- (ii) Time-price differential, credit service, service, carrying, or other charge, however denominated;
- (iii) Premium or other charge for any guarantee or insurance protecting the creditor against the debtor’s default or other credit loss; and
- (iv) Charges incurred for investigating the collateral or credit-worthiness of the debtor or for commissions or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable, unless the creditor had no notice of the charges when the credit was granted.

(b) The term does not include:

- (i) Charges as a result of default or delinquency if made for actual unanticipated late payment, delinquency, default, or other like occurrence, unless the parties agree that these charges are finance charges;

a charge is not made for actual unanticipated late payment, delinquency, default or other like occurrence if imposed on an account that is or may be debited from time to time for purchases or other debts and, under its terms, payment in full or of a specified amount is required when billed, and in the ordinary course of business the debtor is permitted to continue to have purchases or other debts debited to the account after imposition of the charge;

(ii) Deferral charges, section 28-42-302, Idaho Code; or

(iii) A discount, if a creditor purchases or satisfies obligations of a cardholder pursuant to a credit card and the purchase or satisfaction is made at less than the face amount of the obligation.

(19) "Goods" includes goods not in existence at the time the transaction is entered into and merchandise certificates, but excludes money, chattel paper, documents of title, and instruments.

(20) "Insurance premium loan" means a regulated consumer loan that:

(a) Is made for the sole purpose of financing the payment by or on behalf of an insured of the premium on one (1) or more policies or contracts issued by or on behalf of an insurer;

(b) Is secured by an assignment by the insured to the lender of the unearned premium on the policy or contract; and

(c) Contains an authorization to cancel the policy or contract financed.

(21) "Lender," except as otherwise provided, includes an assignee of a lender's right to payment, but use of the term does not in itself impose on an assignee any obligation of the lender.

(22) "Lender credit card" means a credit card issued by a regulated lender.

(23)(a) "Loan" means, except as provided in paragraph (b) of this subsection:

(i) The creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third person for the account of the debtor;

(ii) The creation of debt pursuant to a lender credit card in any manner, including a cash advance or the card issuer's honoring a draft or similar order for the payment of money drawn or accepted by the debtor, paying or agreeing to pay the debtor's obligation, or purchasing or otherwise acquiring the debtor's obligation from the obligee or his assignees;

(iii) The creation of debt by a cash advance to a debtor pursuant to a seller credit card;

(iv) The creation of debt by a credit to an account with the lender upon which the debtor is entitled to draw immediately; and

(v) The forbearance of debt arising from a loan.

(b) "Loan" does not include:

(i) A card issuer's payment or agreement to pay money to a third person for the account of a debtor if the debt of the debtor arises from a sale and results from use of a seller credit card; or

(ii) The forbearance of debt arising from a sale.

(24) "Merchandise certificate" means a writing not redeemable in cash and usable in its face amount in lieu of cash in exchange for goods or services.

(25) “Nationwide mortgage licensing system and registry” or “NMLSR” means a mortgage licensing system developed and maintained by the conference of state bank supervisors and the American association of residential mortgage regulators for the licensing and registration of mortgage brokers, mortgage lenders, mortgage loan originators and other consumer financial service providers.

(26) “Open-end credit” means an arrangement pursuant to which:

(a) A creditor may permit a debtor, from time to time, to purchase on credit from the creditor or pursuant to a credit card, or to obtain loans from the creditor or pursuant to a credit card;

(b) The amounts financed and the finance and other appropriate charges are debited to an account;

(c) The finance charge, if made, is computed on the account periodically; and

(d) Either the debtor has the privilege of paying in full or in installments or the creditor periodically imposes charges computed on the account for delaying payment and permits the debtor to continue to purchase on credit.

(27) “Organization” means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(28) “Payable in installments” means that payment is required or permitted by agreement to be made in:

(a) Two (2) or more periodic payments, excluding a down payment, with respect to a debt arising from a regulated consumer credit sale pursuant to which a finance charge is made;

(b) Four (4) or more periodic payments, excluding a down payment, with respect to a debt arising from a regulated consumer credit sale pursuant to which no finance charge is made; or

(c) Two (2) or more periodic payments with respect to a debt arising from a regulated consumer loan. If any periodic payment other than the down payment under an agreement requiring or permitting two (2) or more periodic payments is more than twice the amount of any other periodic payment, excluding the down payment, the regulated consumer credit sale or regulated consumer loan is “payable in installments.”

(29) “Person” includes a natural person or an individual, and an organization.

(30) “Person related to” with respect to an individual means:

(a) The spouse of the individual;

(b) A brother, brother-in-law, sister or sister-in-law of the individual;

(c) An ancestor or lineal descendant of the individual or his spouse; and

(d) Any other relative, by blood or marriage, of the individual or his spouse who shares the same home with the individual.

“Person related to” with respect to an organization means:

(a) A person directly or indirectly controlling, controlled by or under common control with the organization;

(b) An officer or director of the organization or a person performing similar functions with respect to the organization or to a person related to the organization;

- (c) The spouse of a person related to the organization; and
- (d) A relative by blood or marriage of a person related to the organization who shares the same home with him.

(31) "Precomputed credit transaction" means a credit transaction in which the debt is a sum comprising the amount financed and the amount of the finance charge computed in advance. A disclosure required by the federal consumer credit protection act does not in itself make a finance charge or transaction precomputed.

(32) "Presumed" or "presumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(33) "Regulated consumer credit sale" means a regulated credit sale, subsection (36) of this section, and for a consumer purpose, subsection (12) of this section.

(34) "Regulated consumer credit transaction" means a regulated credit transaction, subsection (37) of this section, and for a consumer purpose, subsection (12) of this section.

(35) "Regulated consumer loan" means a regulated loan, subsection (39) of this section, and for a consumer purpose, subsection (12) of this section.

(36) "Regulated credit sale" means a sale of goods, services, or an interest in land in which:

- (a) Credit is granted either pursuant to a seller credit card or by a seller who regularly engages as a seller in credit transactions of the same kind; and

- (b) The debt is payable in installments or a finance charge is made.

A "regulated credit sale" does not include a sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card.

(37) "Regulated credit transaction" means a regulated credit sale or regulated loan or a refinancing or consolidation thereof.

(38) "Regulated lender" means a person authorized to make, or take assignments of, regulated consumer loans, as a regular business, under section 28-46-301, Idaho Code.

(39) "Regulated loan" means a loan made by a creditor regularly engaged in the business of making loans in which the debt is payable in installments or a finance charge is made. A "regulated loan" does not include a sale in which the seller allows the buyer to purchase pursuant to a seller credit card.

(40) "Sale of goods" includes an agreement in the form of a bailment or lease of goods if the bailee or lessee pays or agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods upon full compliance with the terms of the agreement.

(41) "Sale of an interest in land" includes a lease in which the lessee has an option to purchase the interest and all or a substantial part of the rental or other payments previously made by him are applied to the purchase price.

(42) "Sale of services" means furnishing or agreeing to furnish services and includes making arrangements to have services furnished by another.

(43) “Seller” includes, except as otherwise provided, an assignee of the seller’s right to payment, but use of the term does not in itself impose on an assignee any obligation of the seller.

(44) “Seller credit card” means either:

(a) A credit card issued primarily for the purpose of giving the cardholder the privilege of using the card to purchase property or services from the card issuer, persons related to the card issuer, or persons licensed or franchised to do business under the card issuer’s business or trade name or designation, or both from any of these persons and from other persons; or

(b) A credit card issued by a person except a regulated lender primarily for the purpose of giving the cardholder the privilege of using the credit card to purchase property or services from at least one hundred (100) persons not related to the card issuer.

(45) “Services” includes:

(a) Work, labor, and other personal services;

(b) Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and

(c) Insurance provided by a person other than the insurer.

(46) “Supervised financial organization” means a person, except an insurance company or other organization primarily engaged in an insurance business:

(a) Organized, chartered, or holding an authorization certificate under the laws of this state or of the United States that authorizes the person to make loans and to receive deposits, including a savings, share, certificate or deposit account; and

(b) Subject to supervision by an official or agency of this state or of the United States.

History.

I.C., § 28-41-301, as added by 1983, ch. 119, § 3, p. 264; am. 2006, ch. 122, § 2, p. 340; am. 2013, ch. 54, § 2, p. 108.

STATUTORY NOTES

Amendments.

The 2006 amendment, by ch. 122, redesignated provisions formerly designated as 1., 2., 3., or 4. as (i), (ii), (iii), or (iv) in subsections (18)(a), (18)(b), (23)(a) and (23)(b); substituted “28-42-302” for “28-42-303” in present subsection (b)(ii); inserted “or” in subsection (29)(b); and substituted “section 28-46-301, Idaho Code” for “a license issued by the administrator, section 28-46-301, et seq., Idaho Code” in subsection (37).

The 2013 amendment, by ch. 54, added subsection (25) and redesignated former subsections (25) to (45) as present subsections (26) to (46), conforming related internal references.

Federal References.

The federal consumer credit protection act, referred to in subsection (31), is compiled as 15 U.S.C.S. § 1601 et seq.

Compiler’s Notes.

The term “this act” refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

JUDICIAL DECISIONS

Loan.

Transactions between purported creditors and debtor were intended by parties to be loans not investments because it did not appear that creditors could expect capital appreciation or participation in earnings generated

by debtor. They expected to receive interest payments of 16% per annum, along with repayment of their principal after three years. In re Gables Mgmt., LLC, 473 B.R. 352 (Bankr. D. Idaho 2012).

OPINIONS OF ATTORNEY GENERAL

Late Charges.

Late charges may be lawfully imposed on open-end credit accounts as part of the finance charge, but late charges can only be

imposed on interest-bearing consumer credit transactions if the transaction is a precomputed loan or a loan secured by an interest in real property. OAG 87-11.

28-41-302. Federal consumer credit protection act — Defined. —

In this act “Federal Consumer Credit Protection Act” means the consumer credit protection act, Public Law 90-321; 82 Stat. 146, as amended, to and including January 1, 2005, or a subsequent date if so defined by administrative rule, and includes regulations issued pursuant to that act, as amended to and including January 1, 2005, or a subsequent date if so defined by administrative rule.

History.

I.C., § 28-41-302, as added by 1983, ch. 119, § 3, p. 264; am. 2002, ch. 301, § 2, p. 858;

am. 2003, ch. 74, § 1, p. 246; am. 2004, ch. 98, § 1, p. 355; am. 2005, ch. 263, § 1, p. 808.

STATUTORY NOTES

Federal References.

The federal Consumer Credit Protection Act is compiled as 15 U.S.C.S. § 1601 et seq.

119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

Compiler's Notes.

The term “this act” refers to S.L. 1983, ch.

CHAPTER 42

FINANCE CHARGES AND RELATED PROVISIONS

PART 1. GENERAL PROVISIONS

SECTION.

28-42-101. Short title.

PART 2. MAXIMUM FINANCE CHARGES

28-42-201. Maximum finance charge.

PART 3. OTHER CHARGES AND MODIFICATIONS

28-42-301. Delinquency charges.

28-42-302. Deferral charges.

28-42-303. Finance charge on refinancing.

SECTION.

28-42-304. Finance charge on consolidation.

28-42-305. Conversion to open-end credit.

28-42-306. Right to prepay.

28-42-307. Rebate upon prepayment.

28-42-308. Dishonored check fees.

PART 4. MONEY OF ACCOUNT AND INTEREST

28-42-401. Money of account defined.

28-42-402. Money of other denominations.

28-42-403. Computation of judgments.

28-42-404. Compound interest.

PART 1. GENERAL PROVISIONS

28-42-101. Short title. — This chapter shall be known and may be cited as the Idaho Credit Code — Finance Charges and Related Provisions.

History.

I.C., § 28-42-101, as added by 1983, ch. 119, § 3, p. 264.

PART 2. MAXIMUM FINANCE CHARGES

28-42-201. Maximum finance charge. — (1) With respect to a loan or credit sale, the rate of finance charge shall be that which is agreed upon between the parties to the transaction. In addition to the finance charge permitted herein, a creditor may contract for and receive any other charge, except to the extent expressly prohibited or limited by this act.

(2) This section does not limit or restrict the manner of calculating the finance charge, whether by way of add-on, discount, single annual percentage rate, or otherwise. If the credit transaction is precomputed:

(a) The finance charge may be calculated on the assumption that all scheduled payments will be made when due; and

(b) The effect of prepayment is governed by the provisions on rebate upon prepayment, section 28-42-307, Idaho Code.

(3) Except as provided in subsection (4) of this section, the term of a credit transaction for purposes of this section commences on the day the credit transaction is made. The administrator may adopt rules with respect to treating as regular minor irregularities in amount or time.

(4) With respect to an insurance premium loan, the term of the loan commences on the earliest inception date of a policy or contract of insurance, payment of the premium on which is financed by the loan.

History.

I.C., § 28-42-201, as added by 1983, ch. 119, § 3, p. 264; am. 1991, ch. 278, § 1, p. 720; am. 1993, ch. 227, § 1, p. 797.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

ANALYSIS

Compensation paid.

Conflict of laws.

Contract to which applicable.

Contracts held not usurious.

Contracts held usurious.

Debtor's personal right.

Ineffective contracts for interest.

Interest on judgments.

Interest on receiver's certificates.

Law in effect at time governs.
Recovery of usurious charge.
Test of usury.
Voluntary payment of excess interest.

Compensation Paid.

Where a purchaser of property defaults on conditional sales contract and requires additional time or where refinancing becomes necessary, the compensation paid for the extension or forbearance may not exceed the permissible maximum. *Bell v. Idaho Fin. Co.*, 73 Idaho 560, 255 P.2d 715 (1953).

Conflict of Laws.

Where parties come into this state and loan money to citizens of this state upon real estate situated here, validity of contract will be determined by laws of this state, and usury laws cannot be evaded by a stipulation in contract that it shall be tested and its validity determined by laws of another state. *Fidelity Sav. Ass'n v. Shea*, 6 Idaho 405, 55 P. 1022 (1899).

Where contract was usurious by laws of state wherein it was made but not in state where it was to be performed, parties were presumed to have contracted with reference to laws of latter state, unless bad faith or evasion of usury laws was apparent. *Zimmerman v. Brown*, 30 Idaho 640, 166 P. 924 (1917).

Contract to Which Applicable.

A transaction, in which the creditor corporation agreed to purchase ground designated by the debtor corporation, to construct on it a bowling alley according to the debtor's specifications, and to sell the real estate as so improved to the debtor for an agreed price, was not a loan on the price for the sale of the completed bowling alley to the debtor and was not subject to limitations of former section. *Meridian Bowling Lanes, Inc. v. Brown*, 90 Idaho 403, 412 P.2d 586 (1966).

A "brokerage fee" or "commitment fee" for obtaining agreement to make loans was a matter collateral to the making of the loans and not interest. *D & M Dev. Co. v. Sherwood & Roberts, Inc.*, 93 Idaho 200, 457 P.2d 439 (1969).

Contracts Held Not Usurious.

Where warehouse company loaned its service and credit and received compensation separate and apart from rate of interest charged for principal for such service and credit, transaction was held not usurious. *Equitable Trust Co. v. A.C. White Lumber Co.*, 41 F.2d 60 (D. Idaho 1930).

Payment of commissions to agent for procuring loan did not render loan contract usurious because commission plus interest exceeded rate of interest allowed by statute, in the absence of any showing that agent was

acting on behalf of lender or that latter received any part of agent's compensation. *Cornwell v. McCoy*, 6 Idaho 219, 55 P. 240 (1898); *Cornwell v. Carter*, 6 Idaho 222, 55 P. 1100 (1898); *Cornwell v. Urton*, 6 Idaho 269, 55 P. 294 (1898).

Fact that parties to a loan contract agreed that the same shall bear interest both before and after judgment at ten per cent per annum did not render contract usurious in the absence of any evidence of a corrupt intent to exact usurious interest. *Anderson v. Creamery Package Mfg. Co.*, 8 Idaho 200, 67 P. 493 (1902).

Mortgage bearing highest rate of interest allowed by law was not rendered usurious by a further stipulation whereby mortgagor agreed to pay taxes on the loan; which stipulation was, at time it was entered into, absolutely void by the terms of former law. *First Nat'l Bank v. Glenn*, 10 Idaho 224, 77 P. 623 (1904).

Stipulation to pay bank exchange on borrowed money was not usurious unless it appeared that such stipulation was a device to cover a usurious contract and that it was not intended that money should be remitted to place to which exchange was provided. *Tipton v. Ellsworth*, 18 Idaho 207, 109 P. 134 (1910).

Fact that interest in excess of statutory maximum was allowed for short period did not constitute usury. *Easton v. Butterfield Live Stock Co.*, 48 Idaho 153, 279 P. 716 (1929).

Neither fact that bonds bear higher rate of interest after maturity, whether by expiration of time, on declaration following default, nor collection by intervener for period of interest greater than maximum allowed, rendered contract usurious. *Easton v. Butterfield Live Stock Co.*, 48 Idaho 153, 279 P. 716 (1929); *Eagle Rock Corp. v. Idamont Hotel Co.*, 59 Idaho 413, 85 P.2d 242 (1938).

Where borrower may, by performance of his contract, avoid liability for payment of additional sum, extra payment was not regarded as interest for use of money but as means to enforce punctual payment and as penalty for default. *Easton v. Butterfield Live Stock Co.*, 48 Idaho 153, 279 P. 716 (1929); *Eagle Rock Corp. v. Idamont Hotel Co.*, 59 Idaho 413, 85 P.2d 242 (1938).

Where debtor may relieve himself by payment or performance of his obligation according to its terms, contract providing for higher and even excessive rate after maturity or default was not regarded as usurious. *Easton v. Butterfield Live Stock Co.*, 48 Idaho 153, 279 P. 716 (1929); *Eagle Rock Corp. v.*

Idamont Hotel Co., 59 Idaho 413, 85 P.2d 242 (1938).

Note given in renewal of different successive renewal notes with interest added in each instance and constituting new and separate contract to pay interest upon money due at time of its execution was not a charge of an unlawful rate of interest. *Musser v. Murphy*, 49 Idaho 141, 286 P. 618 (1930).

In suit by buyer of automobile to recover statutory penalty for usury against finance company to whom sales contract had been assigned by used car company, where complaint merely alleged that defendant financed transaction and failed to allege that prior to time of execution of sales agreement parties solicited defendant to make a loan and did not disclose that defendant had anything to do with transaction until after agreement was consummated, complaint was subject to general demurrer since transaction alleged did not come under usury laws. *Bell v. Idaho Fin. Co.*, 73 Idaho 560, 255 P.2d 715 (1953).

"Eagle Rock formula" to determine whether the interest was usurious, as set out in *Eagle Rock Corp. v. Idamont Hotel Co.*, 59 Idaho 413, 85 P.2d 242 (1938), was the difference between the maximum allowable interest rate and the nominal interest rate, as a numerator, over the nominal interest rate, as the denominator, times the amount of money properly chargeable as interest over the entire term of the note, the product equaling the amount of money which could be charged as extra, "hidden" interest without breach of the usury law. *Bethke v. Idaho Sav. & Loan Ass'n*, 93 Idaho 410, 462 P.2d 503 (1969).

Sale of two airplanes was not usurious where the instalment purchase security agreement calling for a 13.1 per cent interest rate unambiguously stated the cash price and the down payment, instalments, adjustments, and finance charges which constituted the higher time purchase price. *C.I.T. Corp. v. Lee Pontiac, Inc.*, 513 F.2d 207 (9th Cir. 1975).

Bona fide sales transactions were not subject to usury laws and the burden of demonstrating that a transaction was a disguised loan subject to the law was on the party alleging usury. *Buchanan v. Dairy Cows*, 97 Idaho 481, 547 P.2d 526 (1976).

Contracts Held Usurious.

Contract which provided for monthly payment of thirty-seven dollars and fifty cents on debt of \$2500, to be applied: 1. To payment of any fines or other assessments made in pursuance of bylaws. 2. To payment of premium for precedence due on loan amounting to eight dollars and seventy-five cents per month. 3. To payment of interest due on loan amounting to twelve dollars fifty cents per month. 4. Balance of said payments to be credited as dues on stock and to continue until dues

credited on stock and dividends equal amount due, was usurious. *Stevens v. Home Sav. & Loan Ass'n*, 5 Idaho 741, 51 P. 779, rehearing denied, 5 Idaho 741, 749 (1898).

Contract of loan between a borrowing member of building and loan association and association, by which borrower agreed to pay a monthly sum of six dollars, applicable to satisfaction of debt, which was six hundred and fifty dollars, and seven dollars and fifteen cents monthly interest (called "dues" on "stock") until debt should be paid was usurious. *Fidelity Sav. Ass'n v. Shea*, 6 Idaho 405, 55 P. 1022 (1899).

Premiums exacted for making loans and retained from face of loan or secured by mortgage constituted unlawful interest, when, added to rate provided by loan contract, they made a rate greater than the statutes authorized, and payments upon such premiums and upon interest and principal had to be applied to reducing principal of debt. *Madsen v. Whitman*, 8 Idaho 762, 71 P. 152 (1902).

Debtor's Personal Right.

No one but a party to contract could avail himself of the defense of usury. *Anderson v. Oregon Mtg. Co.*, 8 Idaho 418, 69 P. 130 (1902).

Since the right to attack or defend against a contract or security given by a borrower or debtor on the ground that it was tainted with usury was a right personal to the borrower or debtor and could be asserted only by him and those in legal priority with him, where respondents failed to establish any priority with the borrower in relation to the alleged usurious contracts, such contracts would have no bearing on the controversy. *Leno v. Northwest Credit Corp.*, 84 Idaho 364, 372 P.2d 765 (1962).

Ineffective Contracts for Interest.

Where it was stipulated in promissory note that the whole sum of both principal and interest shall become immediately due and collectible at the option of holder of note, if payment of interest and principal installments were not made when due, such stipulation was a penalty and will not be enforced as to interest not yet earned on principal. *Tipton v. Ellsworth*, 18 Idaho 207, 109 P. 134 (1910).

Contract with reference to the interest to be paid after judgment had no force or effect whatever. *Consolidated Wagon & Mach. Co. v. Kent*, 23 Idaho 690, 132 P. 305 (1913).

Interest on Judgments.

Judgment entered on a usurious contract legally draws interest from date of rendition. *Finney v. Moore*, 9 Idaho 284, 74 P. 866 (1903).

Judgment bore interest from date of entry on the full amount thereof including costs.

Bashor v. Beloit, 20 Idaho 592, 119 P. 55 (1911).

Interest on Receiver's Certificates.

Court could fix rate of interest on receiver's certificate not exceeding maximum rate prescribed in former section, but such certificates ought not to draw a greater rate of interest than the statutory rate allowed on judgments, especially where they took precedence over mortgages, judgments and other liens existing at time receivership proceedings were instituted. Hewitt v. Walters, 21 Idaho 1, 119 P. 705 (1911).

Law in Effect at Time Governs.

The rate of interest which was provided for by a mortgage and notes secured thereby were governed by former statute in effect at the execution of the mortgage and notes and not by a subsequent amendment. Union Cent. Life Ins. Co. v. Rahn, 63 Idaho 243, 118 P.2d 717 (1941).

Recovery of Usurious Charge.

Defendants, who were charged \$3,500 for a loan of \$7,500 for 22 months disguised under a fictitious sale, were entitled to recover the \$3,500 plus double that amount as statutory penalty. Freedman v. Hendershot, 77 Idaho 213, 290 P.2d 738 (1955).

Test of Usury.

In determining whether usurious interest

had been charged or collected under particular contract, it was not permissible to consider only portion of term: the test was whether lender under his contract received profit on his investment in excess of maximum rate for full period of loan; if he had, there was usury; otherwise not. Easton v. Butterfield Live Stock Co., 48 Idaho 153, 279 P. 716 (1929).

Usury statutes applied only to unmatured contracts where obligation of borrower was definitely fixed. Easton v. Butterfield Live Stock Co., 48 Idaho 153, 279 P. 716 (1929); Eagle Rock Corp. v. Idamont Hotel Co., 59 Idaho 413, 85 P.2d 242 (1938).

The "finance charge" added to the selling price in a conditional sale contract was not interest within the meaning of former section but further charge added to the unpaid balance of the delinquent contract in an agreement for the extension of such contract was interest and, when in excess of the legal interest for the period of such extension, was usury. Peterson v. Philco Fin. Corp., 91 Idaho 644, 428 P.2d 961 (1967).

Voluntary Payment of Excess Interest.

One voluntarily and without mistake of the facts paying interest in excess of that legally due could not recover the excess or have it applied on the principal, except where so provided by statute. Breckenridge v. Johnston, 62 Idaho 121, 108 P.2d 833 (1940).

OPINIONS OF ATTORNEY GENERAL

Late Charges.

Late charges may be lawfully imposed on open-end credit accounts as part of the finance charge, but late charges can only be

imposed on interest-bearing consumer credit transactions if the transaction is a precomputed loan or a loan secured by an interest in real property. OAG 87-11.

RESEARCH REFERENCES

A.L.R. — Usury as affected by mistake in amount or calculation of interest or service charges for loan. 11 A.L.R.3d 1498.

Advance in price for credit sale as compared with cash sale as usury. 14 A.L.R.3d 1065.

Agreement for share in earnings of or income from property in lieu of, or in addition to, interest as usurious. 16 A.L.R.3d 475.

Borrower's initiation of, or fraud contributing to, usurious transaction as affecting rights to remedies of the parties. 16 A.L.R.3d 510.

Provision for interest after maturity at a rate in excess of legal rate as usurious or otherwise illegal. 28 A.L.R.3d 449.

Usury as affected by acceleration clause. 66 A.L.R.3d 650.

Reformation of usurious contract. 74 A.L.R.3d 1239.

Validity under usury laws of provision calling for repayment of principal which exceeds sum loaned by amount reflecting any decline in purchasing power of dollar. 90 A.L.R.3d 763.

Contingency as to borrower's receipt of money or other property from which loan is to be repaid as rendering loan usurious. 92 A.L.R.3d 623.

Leaving part of loan on deposit with lender as usury. 92 A.L.R.3d 769.

Application of usury laws to transactions characterized as "leases". 94 A.L.R.3d 640.

Usury in connection with loan calling for variable interest rate. 18 A.L.R.4th 1068.

PART 3. OTHER CHARGES AND MODIFICATIONS

28-42-301. Delinquency charges. — (1) With respect to a precomputed regulated consumer credit transaction, the parties may contract for a delinquency charge on any installment not paid in full within ten (10) days after its due date, as originally scheduled or as deferred, in an amount which is not more than five percent (5%) of the unpaid amount of the installment, or twelve dollars and fifty cents (\$12.50), whichever is greater.

(2) With respect to a regulated consumer loan secured by a security interest in real property which is used or expected to be used as the residence of the debtor which is not a precomputed regulated consumer loan, the parties may contract for a delinquency charge on any installment not paid in full within fifteen (15) days after its scheduled due date in an amount not exceeding five percent (5%) of the unpaid amount of the installment, or fifteen dollars (\$15.00), whichever is greater.

(3) With respect to all other regulated consumer credit transactions, whether secured or unsecured, and whether such credit transactions are classified as open-end credit or closed-end credit, the parties may contract for a delinquency charge on any installment or scheduled payment not paid in full within ten (10) days after its scheduled due date in an amount not exceeding five percent (5%) of the unpaid amount of the installment or scheduled payment, or fifteen dollars (\$15.00), whichever is greater.

(4) A delinquency charge under subsection (1), subsection (2) or subsection (3) of this section may be collected only once on an installment or scheduled payment, however long it remains in default. No delinquency charge may be collected if the installment or scheduled payment has been deferred and a deferral charge, section 28-42-302, Idaho Code, has been paid or incurred. A delinquency charge may be collected at the time it accrues or at any time thereafter.

(5) No delinquency charge may be collected on an installment or payment which is paid in full within ten (10) days after its scheduled due date even though an earlier maturing installment or scheduled payment or a delinquency charge on an earlier installment or scheduled payment may not have been paid in full. For purposes of this subsection, payments are applied first to current installments or scheduled payments and then to delinquent installments or scheduled payments.

(6) If two (2) installments or parts thereof of a precomputed regulated consumer credit transaction are in default for ten (10) days or more, the creditor may elect to convert the credit transaction from a precomputed regulated consumer credit transaction to one in which the finance charge is based on unpaid balances. In this event, he shall make a rebate pursuant to the provisions on rebate upon prepayment, section 28-42-307, Idaho Code, as of the maturity date of the first delinquent installment, and thereafter may make a finance charge as authorized by the provisions on finance charge for regulated consumer credit transactions. The amount of the rebate shall not be reduced by the amount of any permitted minimum charge, section 28-42-307, Idaho Code.

History.

I.C., § 28-42-301, as added by 1983, ch. 119, § 3, p. 264; am. 1993, ch. 227, § 2, p. 797;

am. 1996, ch. 134, § 1, p. 458; am. 2002, ch. 302, § 1, p. 864.

OPINIONS OF ATTORNEY GENERAL**Late Charges.**

Late charges may be lawfully imposed on open-end credit accounts as part of the finance charge, but late charges can only be

imposed on interest-bearing consumer credit transactions if the transaction is a precomputed loan or a loan secured by an interest in real property. OAG 87-11.

28-42-302. Deferral charges. — (1) With respect to a precomputed regulated consumer credit transaction, refinancing, or consolidation, the parties before or after default may agree in writing to a deferral of all or part of one or more unpaid installments, and the creditor may make and collect a charge not exceeding the rate previously stated to the debtor applied to the amount or amounts deferred for the period of deferral calculated without regard to differences in the lengths of months, but proportionally for a part of a month, counting each day as 1/30th of a month. A deferral charge may be collected at the time it is assessed or at any time thereafter.

(2) The parties may agree in writing at the time of a precomputed regulated consumer credit transaction, refinancing, or consolidation that if an installment is not paid within ten (10) days after its due date, the creditor may unilaterally grant a deferral and make charges as provided in this section. No deferral charge may be made for a period after the date that the creditor elects to accelerate the maturity of the agreement.

(3) A delinquency charge made by the creditor on an installment may not be retained if a deferral charge is made pursuant to this section with respect to the period of delinquency.

History.

I.C., § 28-42-302, as added by 1983, ch. 119, § 3, p. 264.

28-42-303. Finance charge on refinancing. — With respect to a regulated consumer credit transaction, the creditor may, by agreement with the debtor, refinance the unpaid balance and may contract for and receive a finance charge based on the amount financed resulting from the refinancing. The amount financed resulting from the refinancing comprises, if the transaction was not precomputed, the total of the unpaid balance and accrued charges on the date of refinancing, or, if the transaction was precomputed, the amount which the borrower or buyer would have been required to pay upon prepayment pursuant to the provisions on rebate upon prepayment, section 28-42-307, Idaho Code, on the date of refinancing, except that for the purpose of computing this amount, no minimum charge shall be allowed.

History.

I.C., § 28-42-303, as added by 1983, ch. 119, § 3, p. 264.

28-42-304. Finance charge on consolidation. — If a debtor owes an

unpaid balance to a creditor with respect to a regulated consumer loan or regulated consumer credit sale, or a refinancing or consolidation thereof, and becomes obligated on another regulated consumer loan or regulated consumer credit sale, or a refinancing or consolidation thereof, with the same lender or seller, the parties may agree to a consolidation resulting in a single schedule of payments pursuant to either of the following subsections:

(1) The parties may agree to refinance the unpaid balance with respect to the previous loan or sale pursuant to the provisions on refinancing, section 28-42-303, Idaho Code, and to consolidate the amount financed resulting from the refinancing by adding it to the amount financed with respect to the subsequent loan or sale. The lender or seller may contract for and receive a finance charge based on the aggregate amount financed resulting from the consolidation.

(2) The parties may agree to consolidate the unpaid balance of a regulated consumer loan or regulated consumer credit sale with the unpaid balance of another regulated consumer loan or regulated consumer credit sale. The parties may agree in writing to refinance the previous unpaid balance pursuant to the provisions on refinancing, section 28-42-303, Idaho Code, and to consolidate the amount financed resulting from the refinancing or the principal resulting from the refinancing by adding to it the amount financed or the principal with respect to the subsequent loan or sale; the aggregate amount resulting from the consolidation shall be deemed principal and the creditor may contract for and receive a finance charge based upon the principal.

History.

I.C., § 28-42-304, as added by 1983, ch. 119, § 3, p. 264.

28-42-305. Conversion to open-end credit. — The parties may agree at or within ten (10) days before the time of conversion to add the unpaid balance of a regulated consumer credit transaction not made pursuant to open-end credit to the debtor's open-end credit account with the creditor. The unpaid balance so added is an amount equal to the amount financed, determined according to the provision on finance charge on refinancing, section 28-42-303, Idaho Code.

History.

I.C., § 28-42-305, as added by 1983, ch. 119, § 3, p. 264.

28-42-306. Right to prepay. — (1) Subject to the provisions on rebate upon prepayment, section 28-42-307, Idaho Code, and subject to the provisions of subsection (2) of this section, the debtor may prepay in full the unpaid balance of a regulated consumer credit transaction at any time without penalty.

(2) With respect to a regulated consumer credit transaction which is primarily secured by a mortgage or deed of trust on real property, the parties may agree upon a prepayment charge to be paid by the debtor to the creditor

if the debt is repaid in full and prior to its due date, during the first three (3) years of the contract, which prepayment charge shall not exceed the following:

(a) For closed-end loans, the prepayment charge may not exceed an amount equal to six (6) months interest calculated on the average balance for the prior six (6) months at the rate of interest designated in the contract. If the prepayment occurs prior to the expiration of six (6) months from the date of the contract, the prepayment charge may be calculated in the same manner, except the number of months shall be the number of months the loan has existed;

(b) For open-end loans, the amount of the prepayment charge shall not exceed an amount equal to six (6) months finance charge at the annual percentage rate in effect at the time of prepayment, calculated on the average of the average daily balances on the account for the last six (6) billing periods prior to prepayment. If the account has been open for less than six (6) billing periods, the prepayment charge shall be calculated in the same manner, except the number of billing periods shall be the number of billing periods the account has been open.

(3) No prepayment charge may be charged or collected if the loan is refinanced or consolidated with the same lender.

(4) Disclosure of any prepayment charge authorized by this section shall be made by the creditor to the debtor in such manner and form as may be approved by the director.

History.

I.C., § 28-42-306, as added by 1983, ch. 119, § 3, p. 264; am. 1996, ch. 244, § 1, p. 774.

28-42-307. Rebate upon prepayment. — (1) Except as provided in subsection (2) of this section, upon prepayment in full of the unpaid balance of a precomputed regulated consumer loan or regulated consumer credit sale, refinancing, or consolidation, an amount not less than the unearned portion of the finance charge calculated according to this section shall be rebated to the debtor. If the rebate otherwise required is less than one dollar (\$1.00), no rebate need be made.

(2) Upon prepayment in full of a regulated consumer loan or regulated consumer credit sale, other than one pursuant to open-end credit, a refinancing, or consolidation, whether or not precomputed, the creditor may collect or retain a minimum charge within the limits stated in this subsection if the finance charge earned at the time of prepayment is less than any minimum charge contracted for. The minimum charge may not exceed the amount of finance charge contracted for, or five dollars (\$5.00) in a transaction which had a principal of seventy-five dollars (\$75.00) or less, or seven dollars and fifty cents (\$7.50) in a transaction which had a principal of more than seventy-five dollars (\$75.00).

(3)(a) Except as otherwise provided in this section, the unearned finance charge shall be an amount which is a proportion of the precomputed interest at least as great as the sum of the remaining monthly balances of principal and interest combined scheduled to follow the installment date

nearest the date of prepayment bears to the sum of all the monthly balances of principal and interest combined originally scheduled by the contract. If such prepayment occurs before the first installment date, an additional refund of 1/30th of the portion of precomputed interest which should be retained in the first installment period shall be made for each day from the date of prepayment in full to the first scheduled installment date. Any prepayment made on or before the 15th day following an installment date shall be deemed to have been made on the preceding installment date.

(b) With respect to a precomputed transaction entered into on or after July 1, 1978, and payable according to its original terms in more than sixty-one (61) installments, the unearned portion of the finance charge is, at the option of the creditor, either:

1. That portion which is applicable to all fully unexpired computational periods as originally scheduled, or, if deferred, as deferred, which follow the date of prepayment. For this purpose, the applicable charge is the total of that which would have been made for each such period, had the regulated consumer loan or regulated consumer credit sale not been precomputed, by applying to unpaid balances of principal, according to the actuarial method, the rate of finance charge previously stated to the debtor based upon the assumption that all payments were made as originally scheduled, or if deferred, as deferred. The creditor, at his option, may round the stated rate to the nearest one-quarter ($1/4$) of one percent (1%) if such procedure is not consistently used to obtain a greater yield than would otherwise be permitted; or

2. The total finance charge minus the earned finance charge. The earned finance charge shall be determined by applying the rate previously stated to the debtor according to the actuarial method to the actual unpaid balances for the actual time the balances were unpaid up to the date of prepayment. If a delinquency or deferral charge was collected, it shall be treated as a payment.

(4) In this section:

(a) "Periodic balance" means the amount scheduled to be outstanding on the last day of a computational period before deducting the payment, if any, scheduled to be made on that date;

(b) "Computational period" means one (1) month if one-half ($1/2$) or more of the intervals between scheduled payments under the agreement is one (1) month or more, and otherwise means one (1) week;

(c) The "interval" to the due date of the first scheduled installment or the final scheduled payment date is measured from the date of a loan or credit sale, refinancing, or consolidation, and includes either the first or last day of the interval;

(d) If the interval to the due date of the first scheduled installment does not exceed one (1) month by more than fifteen (15) days when the computational period is one (1) month, or eleven (11) days when the computational period is one (1) week, the interval shall be considered as one (1) computational period.

(5) This subsection applies only if the schedule of payments is not regular.

(a) If the computational period is one (1) month and:

1. If the number of days in the interval to the due date of the first scheduled installment is less than one (1) month by more than five (5) days, or more than one (1) month by more than five (5) days but not more than fifteen (15) days, the unearned finance charge shall be increased by an adjustment for each day by which the interval is less than one (1) month and, at the option of the creditor, may be reduced by an adjustment for each day by which the interval is more than one (1) month; the adjustment for each day shall be 1/30th of that part of the finance charge earned in the computational period prior to the due date of the first scheduled installment assuming that period to be one (1) month; and
2. If the interval to the final scheduled payment date is a number of computational periods plus an additional number of days less than a full month, the additional number of days shall be considered a computational period only if sixteen (16) days or more. This subparagraph applies whether or not subsection 5(a)1. applies.

(b) Notwithstanding paragraph (a), if the computational period is one (1) month, the number of days in the interval to the due date of the first installment exceeds one (1) month by not more than fifteen (15) days, and the schedule of payments is otherwise regular, the creditor at his option may exclude the extra days and the charge for the extra days in computing the unearned finance charge; but if he does so and a rebate is required before the due date of the first scheduled installment, he shall compute the earned charge for each elapsed day as 1/30th of the amount the earned charge would have been if the first interval had been one (1) month.

(c) If the computational period is one (1) week and:

1. If the number of days in the interval to the due date of the first scheduled installment is less than five (5) days, or more than nine (9) days but not more than eleven (11) days, the unearned finance charge shall be increased by an adjustment for each day by which the interval is less than seven (7) days and, at the option of the creditor, may be reduced by an adjustment for each day by which the interval is more than seven (7) days; the adjustment for each day shall be 1/7th of that part of the finance charge earned in the computational period prior to the due date of the first scheduled installment assuming that period to be one (1) week; and
2. If the interval to the final scheduled payment date is a number of computational periods plus an additional number of days less than a full week, the additional number of days shall be considered a computational period only if four (4) days or more. This subparagraph applies whether or not subsection 5(c)1. applies.

(6) If a deferral, section 28-42-302, Idaho Code, has been agreed to, the unearned portion of the finance charge shall be computed with regard to the deferral. If the deferral charge earned is less than the deferral charge paid, the difference shall be added to the unearned portion of the finance charge. If any part of a deferral charge has been earned but has not been paid, that

part shall be subtracted from the unearned portion of the finance charge or shall be added to the unpaid balance.

(7) This section does not preclude the collection or retention by the creditor of delinquency charges, section 28-42-301, Idaho Code.

(8) If the maturity is accelerated for any reason and judgment is obtained, the debtor is entitled to the same rebate as if the payment had been made on the date judgment is entered.

(9) Upon prepayment in full of a regulated consumer loan or regulated consumer credit sale by the proceeds of credit insurance, section 28-44-103, Idaho Code, the debtor or his estate is entitled to the same rebate as though the debtor had prepaid the agreement on the date the proceeds of the insurance are paid to the creditor, but no later than ten (10) business days after satisfactory proof of loss is furnished to the creditor.

History.

I.C., § 28-42-307, as added by 1983, ch. 119, § 3, p. 264.

28-42-308. Dishonored check fees. — With respect to a regulated credit transaction, a dishonored check fee in the amount allowed as a set collection fee under section 28-22-105, Idaho Code, may be charged and collected by a creditor, for the return by a depository institution of a dishonored check, negotiable order of withdrawal, or share draft, offered by a debtor in full or partial repayment of a regulated credit transaction, and, provided that the fee is contracted for between the parties.

History.

I.C., § 28-42-308, as added by 1994, ch. 185, § 4, p. 603; am. 1997, ch. 73, § 1, p. 153.

PART 4. MONEY OF ACCOUNT AND INTEREST

28-42-401. Money of account defined. — The money of account in this state is the dollar, cent and mill, and all public accounts and the proceedings of all courts in relation to money must be kept and expressed in money of the above denomination.

History.

I.C., § 28-42-401, as added by 1983, ch. 119, § 3, p. 264.

28-42-402. Money of other denominations. — The above provisions do not in any manner affect any demand expressed in money of another denomination, but such demand in any suit or proceeding affecting the same must be reduced to the above denominations.

History.

I.C., § 28-42-402, as added by 1983, ch. 119, § 3, p. 264.

28-42-403. Computation of judgments. — In all judgments rendered

by any court for any debt, damages or costs, and in all executions issued thereon, the amount must be computed, as near as may be, in dollars and cents, rejecting small fractions; and no judgment or other proceeding is erroneous for such omission.

History.

I.C., § 28-42-403, as added by 1983, ch. 119, § 3, p. 264.

28-42-404. Compound interest. — Parties may agree in writing for the payment of compound interest.

History.

I.C., § 28-42-404, as added by 1983, ch. 119, § 3, p. 264.

JUDICIAL DECISIONS

Cited in: *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

DECISIONS UNDER PRIOR LAW**ANALYSIS**

Interest on interest.

Renewal notes including interest.

Interest on Interest.

Coupon notes given for the interest of the principal debt which by their terms drew interest after maturity were in contravention of former section forbidding compound interest and were usurious. *Vermont Loan & Trust Co. v. Hoffman*, 5 Idaho 376, 49 P. 314 (1897); *Vermont Loan & Trust Co. v. Tetzlaff*, 6 Idaho 105, 53 P. 104 (1898); *Vermont Loan & Trust Co. v. Maxwell*, 6 Idaho 108, 53 P. 1130 (1898); *Cleveland v. Western Loan & Sav. Co.*, 7 Idaho 477, 63 P. 885 (1901).

Stipulation in a promissory note that interest upon interest was to be paid was in contravention of the provisions of former section. *State v. Fitzpatrick*, 5 Idaho 499, 51 P. 112 (1897).

A contract not tainted with usury in its

inception would not be affected by subsequent usurious transactions in connection therewith. *Stinson v. Bisbee*, 55 Idaho 38, 37 P.2d 236, 102 A.L.R. 570 (1934).

Provision in notes for interest on past-due interest did not render notes usurious, since the interest paid, and not what was contracted or asked for, governed. *Union Cent. Life Ins. Co. v. Rahn*, 63 Idaho 243, 118 P.2d 717 (1941).

Renewal Notes Including Interest.

Note given in renewal of different successive renewal notes with interest added in each instance and constituting new and separate contract to pay interest upon money due at time of its execution was not charge of unlawful rate of interest. *Musser v. Murphy*, 49 Idaho 141, 286 P. 618 (1930).

RESEARCH REFERENCES

A.L.R. — What is "compound interest" within meaning of statutes prohibiting the charging of such interest. 10 A.L.R.3d 421.

CHAPTER 43

REGULATION OF AGREEMENTS AND PRACTICES

PART 1. GENERAL PROVISIONS

SECTION.

28-43-101. Short title.

PART 2. DISCLOSURE

28-43-201. Compliance with Federal Consumer Credit Protection Act.

28-43-202. Notice of assignment.

28-43-203. Change in terms of open-end consumer credit accounts.

28-43-204. Receipts — Statements of account — Evidence of payment.

28-43-205. Form of insurance premium loan agreement.

PART 3. LIMITATIONS ON AGREEMENTS AND PRACTICES IN REGULATED CONSUMER CREDIT TRANSACTIONS

28-43-301. Security in sales.

28-43-302. Cross-collateral.

28-43-303. Debt secured by cross-collateral.

SECTION.

28-43-304. No assignment of earnings.

28-43-305. Authorization to confess judgment prohibited.

28-43-306. Certain negotiable instruments prohibited.

28-43-307. Balloon payments.

28-43-308. Referral sales.

28-43-309. Restrictions on interest in land as security.

28-43-310. Regular schedule of payments — Maximum loan term.

28-43-311. Limitation on attorney fees.

28-43-312. Attorney's fees.

PART 4. HOME SOLICITATION SALES

28-43-401. Home solicitation sale defined.

28-43-402. Buyer's right to cancel.

28-43-403. Form of agreement or offer — Statement of buyer's rights.

28-43-404. Restoration of down payment.

28-43-405. Duty of buyer — No compensation for services before cancellation.

PART 1. GENERAL PROVISIONS

28-43-101. Short title. — This chapter shall be known and may be cited as the Idaho Credit Code — Regulation of Agreements and Practices.

History.

I.C., § 28-43-101, as added by 1983, ch. 119, § 3, p. 264.

PART 2. DISCLOSURE

28-43-201. Compliance with Federal Consumer Credit Protection Act. — A person upon whom the Federal Consumer Credit Protection Act, including regulations promulgated pursuant thereto, imposes duties or obligations, shall make or give to the debtor the disclosures, information, and notices required of him by that act and in all respects comply with that act. This section imposes the duty on a creditor to comply with the terms of the Federal Consumer Credit Protection Act only with respect to those credit transactions to which the Federal Consumer Credit Protection Act by its terms applies.

History.

I.C., § 28-43-201, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Federal References.

The federal Consumer Credit Protection

Act, referred to in this section, is compiled as 15 U.S.C.S. § 1601 et seq.

28-43-202. Notice of assignment. — A debtor may pay the original creditor until he receives notification of assignment of rights to payment pursuant to a regulated consumer credit transaction and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the debtor, the assignee shall seasonably furnish reasonable proof that the assignment has been made and unless he does so, the debtor may pay the original creditor.

History.

I.C., § 28-43-202, as added by 1983, ch. 119, § 3, p. 264.

28-43-203. Change in terms of open-end consumer credit accounts. — Whether or not a change is authorized by prior agreement, a creditor may change the terms of an open-end consumer credit account applying to any balance incurred before or after the effective date of the change.

History.

I.C., § 28-43-203, as added by 1983, ch. 119, § 3, p. 264.

28-43-204. Receipts — Statements of account — Evidence of payment. — (1) The creditor shall deliver or mail to the debtor, without request, a written receipt for each payment by coin or currency on an obligation pursuant to a regulated consumer credit transaction. A periodic statement showing a payment received by mail complies with this subsection.

(2) Upon written request of a debtor, the person to whom an obligation is owed pursuant to a regulated consumer credit transaction, except one pursuant to open-end consumer credit, shall provide a written statement of the dates and amounts of payments made within the twelve (12) months preceding the month in which the request is received and the total amount unpaid as of the end of the period covered by the statement. The statement shall be provided without charge once during each year of the term of the obligation. If additional statements are requested, the creditor may make a reasonable charge not in excess of ten dollars (\$10.00) for each additional statement.

(3) After a debtor has fulfilled all obligations with respect to a regulated consumer credit transaction, except one pursuant to open-end consumer credit, the person to whom the obligation was owed, upon request of the debtor, shall deliver or mail to the debtor written evidence acknowledging payment in full of all obligations with respect to the transaction.

History.

I.C., § 28-43-204, as added by 1983, ch. 119, § 3, p. 264.

28-43-205. Form of insurance premium loan agreement. — An agreement pursuant to which an insurance premium loan is made shall contain the names of the insurance agent or broker negotiating each policy

or contract and of the insurer issuing each policy or contract, the number and inception date of, and premium for, each policy or contract, the date on which the term of the loan begins, and a clear and conspicuous notice that each policy or contract may be cancelled if payment is not made in accordance with the agreement. If a policy or contract has not been issued by the time the agreement is signed, the agreement may provide that the insurance agent or broker may insert the appropriate information in the agreement and, if he does so, shall furnish the information promptly in writing to the insured.

History.

I.C., § 28-43-205, as added by 1983, ch. 119, § 3, p. 264.

PART 3. LIMITATIONS ON AGREEMENTS AND PRACTICES IN REGULATED
CONSUMER CREDIT TRANSACTIONS

28-43-301. Security in sales. — (1) With respect to a regulated consumer credit sale, a seller may take a security interest in the property sold. In addition, a seller may take a security interest in goods upon which services are performed or in which goods sold are installed or to which they are annexed, or in land to which the goods are affixed or which is maintained, repaired or improved as a result of the sale of the goods or services, if in the case of a security interest in land the debt secured is one thousand dollars (\$1,000) or more, or, in the case of a security interest in goods, the debt secured is one hundred dollars (\$100) or more. Except as provided with respect to cross-collateral, section 28-43-302, Idaho Code, a seller may not otherwise take a security interest in property to secure the debt arising from a regulated consumer credit sale.

(2) A security interest taken in violation of this section is void.

History.

I.C., § 28-43-301, as added by 1983, ch. 119, § 3, p. 264.

28-43-302. Cross-collateral. — (1) In addition to contracting for a security interest pursuant to the provisions on security in sales, section 28-43-301, Idaho Code, a seller in a regulated consumer credit sale may secure the debt arising from the sale by contracting for a security interest in other property if, as a result of a prior sale, the seller has an existing security interest in the other property. The seller may also contract for a security interest in the property sold in the subsequent sale as security for the previous debt.

(2) If the seller contracts for a security interest in other property pursuant to this section, the finance charge thereafter on the aggregate unpaid balances so secured may not exceed that permitted if the balances so secured were consolidated pursuant to the provisions on finance charge on consolidation, subsection (2) of section 28-42-304, Idaho Code. The seller has a reasonable time after so contracting in which to make any adjustments required by this section.

History.

I.C., § 28-43-302, as added by 1983, ch. 119, § 3, p. 264.

28-43-303. Debt secured by cross-collateral. — (1) If debts arising from two (2) or more regulated consumer credit sales, except sales pursuant to open-end credit, are secured by cross-collateral, section 28-43-302, Idaho Code, or consolidated into one (1) debt payable on a single schedule of payments, and the debt is secured by security interests taken with respect to one or more of the sales, payments received by the seller after the taking of the cross-collateral or the consolidation are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been first applied to the payment of the debts arising from the sales first made. To the extent debts are paid according to this section, security interests in items of property terminate as the debt originally incurred with respect to each item is paid.

(2) Payments received by the seller upon an open-end consumer credit account are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries to the account showing the debts were made.

(3) If the debts consolidated arose from two (2) or more sales made on the same day, payments received by the seller are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been first applied to the payment of the smallest debt.

History.

I.C., § 28-43-303, as added by 1983, ch. 119, § 3, p. 264.

JUDICIAL DECISIONS

Purchase Money Security Interest.

Where debtor purchased household furnishings and electronic equipment under a series of four agreements, since the third agreement constituted a novation of second agreement, debt was not incurred for the purpose of purchasing the collateral to the second agreement and creditor did not have a purchase money security interest (PMSI) in that collateral; however, the fourth agreement did not constitute a novation of the third agreement, and so creditor retained a PMSI in the property purchased under the third

agreement and also retained a PMSI in the property purchased under the fourth agreement; the commingling of the PMSI debt with non-PMSI debt in the third and fourth agreements did not transform the PMSI to a nonpurchase-money security interest; therefore, the debtors are entitled to avoid the liens against the property purchased by the second agreement but may not avoid the liens against property purchased under the third or fourth agreements. *In re Butler*, 160 Bankr. 155 (Bankr. D. Idaho 1993).

28-43-304. No assignment of earnings. — (1) A creditor may not take an assignment of earnings of the debtor for payment or as security for payment of a debt arising out of a regulated consumer credit transaction. An assignment of earnings in violation of this section is unenforceable by the assignee of the earnings and revocable by the debtor. This section does not prohibit a debtor from authorizing deductions from his earnings in favor of

his creditor if the authorization is revocable, the debtor is given a complete copy of the writing evidencing the authorization at the time he signs it, and the writing contains on its face a conspicuous notice of the debtor's right to revoke the authorization.

(2) A sale of unpaid earnings made in consideration of the payment of money to or for the account of the seller of the earnings is deemed to be a loan to him secured by an assignment of earnings.

History.

I.C., § 28-43-304, as added by 1983, ch. 119, § 3, p. 264.

28-43-305. Authorization to confess judgment prohibited. — A debtor may not authorize any person to confess judgment on a claim arising out of a regulated consumer credit transaction. An authorization in violation of this section is void.

History.

I.C., § 28-43-305, as added by 1983, ch. 119, § 3, p. 264.

28-43-306. Certain negotiable instruments prohibited. — With respect to a regulated consumer credit sale, the creditor may not take a negotiable instrument other than a check dated not later than ten (10) days after its issuance as evidence of the obligation of the debtor.

History.

I.C., § 28-43-306, as added by 1983, ch. 119, § 3, p. 264.

28-43-307. Balloon payments. — (1) Except as provided in subsection (2) of this section, if any scheduled payment of a regulated consumer credit transaction is more than twice as large as the average of earlier scheduled payments, the debtor has the right to refinance, without penalty, the amount of that payment at the time it is due. The terms of the refinancing shall be no less favorable to the debtor than the terms of the original transaction.

(2) This section does not apply to:

- (a) A transaction pursuant to open-end credit;
- (b) A transaction to the extent that the payment schedule is adjusted to the seasonal or irregular income or scheduled payments or obligations of the debtor;
- (c) A transaction of a class defined by rule of the administrator as not requiring for the protection of the debtor his right to refinance as provided in this section; or
- (d) A transaction secured by a second deed of trust or mortgage on a one (1) to four (4) family dwelling occupied by the debtor.

History.

I.C., § 28-43-307, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Director of department of finance as administrator, § 28-46-103.

28-43-308. Referral sales. — With respect to a regulated consumer credit sale, the seller may not give or offer to give a rebate or discount or otherwise pay or offer to pay value to the debtor as an inducement for a sale for the debtor giving to the seller the names of prospective buyers, or otherwise aiding the seller in making a sale to another person, if the earning of the rebate, discount, or other value is contingent upon the occurrence of an event after the time the debtor agrees to buy. If a debtor is induced by a violation of this section to enter into a regulated consumer credit sale, the agreement is unenforceable by the seller and the debtor, at his option, may rescind the agreement or retain the property delivered and the benefit of any services performed, without any obligation to pay for them.

History.

I.C., § 28-43-308, as added by 1983, ch. 119, § 3, p. 264.

28-43-309. Restrictions on interest in land as security. — With respect to a regulated consumer loan in which the principal is one thousand dollars (\$1,000) or less, a regulated lender may not contract for an interest in land as security. A security interest taken in violation of this section is void.

History.

I.C., § 28-43-309, as added by 1983, ch. 119, § 3, p. 264.

28-43-310. Regular schedule of payments — Maximum loan term. — Regulated consumer loans, not made pursuant to open-end credit and in which the principal is one thousand dollars (\$1,000) or less, shall be scheduled to be payable in substantially equal installments at equal periodic intervals except to the extent that the schedule of payments is adjusted to the seasonal or irregular income of the debtor, and:

(1) Over a period of not more than thirty-seven (37) months if the principal is more than three hundred dollars (\$300), or

(2) Over a period of not more than twenty-five (25) months if the principal is three hundred dollars (\$300) or less.

History.

I.C., § 28-43-310, as added by 1983, ch. 119, § 3, p. 264.

28-43-311. Limitation on attorney fees. — With respect to a regulated consumer loan in which the principal is one thousand dollars (\$1,000) or less, the agreement may not provide for the payment by the debtor of attorney's fees. A provision in violation of this section is unenforceable.

History.

I.C., § 28-43-311, as added by 1983, ch. 119,
§ 3, p. 264.

28-43-312. Attorney's fees. — Except as provided by the provisions on limitations on attorney's fees as to certain regulated consumer loans, section 28-43-311, Idaho Code, with respect to a regulated consumer credit transaction the agreement may provide for the payment by the debtor of reasonable attorney's fees after default and referral to an attorney not a salaried employee of the creditor. A provision in violation of this section is unenforceable.

History.

I.C., § 28-43-312, as added by 1983, ch.
119, § 3, p. 264.

PART 4. HOME SOLICITATION SALES

28-43-401. Home solicitation sale defined. — "Home solicitation sale" means a regulated consumer credit sale of goods or services, in which the seller or a person acting for him personally solicits the sale, and the buyer's agreement or offer to purchase is given to the seller or a person acting for him, at his residence. It does not include a sale made pursuant to a preexisting open-end credit account with the seller or pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale, a transaction conducted and consummated entirely by mail or telephone, or a sale which is subject to the provisions of the Federal Consumer Credit Protection Act on the consumer's right to rescind certain transactions.

History.

I.C., § 28-43-401, as added by 1983, ch.
119, § 3, p. 264.

STATUTORY NOTES**Federal References.**

The federal Consumer Credit Protection Act, referred to in this section, is compiled as
15 U.S.C.S. § 1601 et seq.

28-43-402. Buyer's right to cancel. — (1) In addition to any right otherwise to revoke an offer, the buyer may cancel a home solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase which complies with this part 4.

(2) Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement or offer to purchase.

(3) Notice of cancellation, if given by mail, is given when it is properly addressed with postage prepaid and deposited in a mailbox.

(4) Notice of cancellation given by the buyer need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the home solicitation sale.

History.

I.C., § 28-43-402, as added by 1983, ch. 119, § 3, p. 264.

28-43-403. Form of agreement or offer — Statement of buyer's rights. — (1) In a home solicitation sale, the seller shall present to the buyer and obtain his signature to a written agreement or offer to purchase that designates as the date of the transaction the date on which the buyer actually signs, and contains a statement of the buyer's rights that complies with subsection (2) of this section. A copy of any writing required by this subsection to be signed by the buyer, completed at least as to the date of the transaction and the name and mailing address of the seller, shall be given to the buyer at the time he signs the writing.

(2) The statement shall either:

(a) Comply with any notice of cancellation or similar requirement of any trade regulation rule of the Federal Trade Commission which by its terms applies to the home solicitation sale; or

(b) Appear under the conspicuous caption: "BUYER'S RIGHT TO CANCEL," and read as follows: "If you decide you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want the goods or services and must be mailed before midnight of the third business day after you sign this agreement. The notice must be mailed to: _____."

(insert name and mailing address of seller)

(3) Until the seller has complied with this section, the buyer may cancel the home solicitation sale by notifying the seller in any manner and by any means of his intention to cancel.

History.

I.C., § 28-43-403, as added by 1983, ch. 119, § 3, p. 264.

28-43-404. Restoration of down payment. — (1) Within ten (10) days after a notice of cancellation has been received by the seller or an offer to purchase has been otherwise revoked, the seller shall tender to the buyer any payments made by the buyer, any note or other evidence of indebtedness, and any goods traded in. A provision permitting the seller to keep all or any part of any goods traded in, payment, note or evidence of indebtedness is in violation of this section and unenforceable.

(2) If the down payment includes goods traded in, the goods shall be tendered in substantially as good condition as when received by the seller. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(3) Until the seller has complied with the obligations imposed by this section, the buyer may retain possession of goods delivered to him by the seller and has a lien on the goods in his possession or control for any recovery to which he is entitled.

History.

I.C., § 28-43-404, as added by 1983, ch. 119, § 3, p. 264.

28-43-405. Duty of buyer — No compensation for services before cancellation. — Except as provided by the provisions on retention of goods by the buyer, subsection (3) of section 28-43-404, Idaho Code, and allowing for ordinary wear and tear or consumption of the goods contemplated by the transaction, within a reasonable time after a home solicitation sale has been cancelled or an offer to purchase revoked, the buyer upon demand shall tender to the seller any goods delivered by the seller pursuant to the sale, but he is not obligated to tender at any place other than his residence. If the seller fails to demand possession of goods within a reasonable time after cancellation or revocation, the goods become the property of the buyer without obligation to pay for them. For the purpose of this section, a reasonable time is presumed to be forty (40) days.

History.

I.C., § 28-43-405, as added by 1983, ch. 119, § 3, p. 264.

CHAPTER 44

INSURANCE

PART 1. INSURANCE IN GENERAL

SECTION.

28-44-101. Short title.

28-44-102. Scope — Relation to credit insurance act — Applicability to parties.

28-44-103. Credit insurance — Credit Insurance Act — Defined.

28-44-104. Creditor's provision of and charge for insurance — Excess amount of charge.

28-44-105. Conditions applying to insurance to be provided by creditor.

28-44-106. Unconscionability.

28-44-107. Maximum charge by creditor for insurance.

28-44-108. Refund or credit required — Amount.

28-44-109. Existing insurance — Choice of insurer.

28-44-110. Charge for insurance in connection with a deferral, refinanc-

SECTION.

ing, or consolidation — Duplicate charges.

28-44-111. Cooperation between departments.

PART 2. CREDIT INSURANCE

28-44-201. Term of insurance.

28-44-202. Amount of insurance.

28-44-203. Filing and approval of rates and forms.

PART 3. PROPERTY AND LIABILITY INSURANCE

28-44-301. Property insurance.

28-44-302. Insurance on creditor's interest only.

28-44-303. Liability insurance.

28-44-304. Cancellation by creditor.

PART 4. INSURANCE PURSUANT TO A PREMIUM FINANCE LOAN

28-44-401. Cancellation of insurance pursuant to a premium finance loan.

PART 1. INSURANCE IN GENERAL

28-44-101. Short title. — This chapter shall be known and may be cited as Idaho Credit Code — Insurance in Regulated Consumer Credit Transactions.

History.

I.C., § 28-44-101, as added by 1983, ch. 119, § 3, p. 264.

28-44-102. Scope — Relation to credit insurance act — Applicability to parties. — (1) Except as provided in subsection (2) of this section, this chapter applies to insurance provided or to be provided in relation to a regulated consumer credit transaction, as defined in section 28-41-301, Idaho Code.

(2) The provision on cancellation by a creditor, section 28-44-304, Idaho Code, applies to loans the primary purpose of which is the financing of insurance. No other provision of this chapter applies to insurance so financed.

(3) This chapter supplements and does not repeal the credit insurance act, chapter 23, title 41, Idaho Code. The provisions of this act concerning administrative controls, liabilities, and penalties do not apply to persons acting as insurers, as defined by title 41, Idaho Code, or rules prescribed by the director of the department of insurance.

History.

I.C., § 28-44-102, as added by 1983, ch. 119, § 3, p. 264; am. 2013, ch. 54, § 11, p. 108.

STATUTORY NOTES**Amendments.**

The 2013 amendment, by ch. 54, substituted “as defined in section 28-41-301, Idaho Code” for “subsection 33 of section 28-41-301), Idaho Code” at the end of subsection (1) and deleted “and regulations” following “or rules” near the end of the last sentence in subsection (3).

Compiler's Notes.

The term “this act” refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

JUDICIAL DECISIONS

Cited in: Irwin Rogers Ins. Agency, Inc. v. Murphy, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

28-44-103. Credit insurance — Credit Insurance Act — Defined. — (1) In this act, “credit insurance” means insurance, other than insurance on property, by which the satisfaction of debt in whole or in part is a benefit provided, but does not include:

- (a) Insurance provided in relation to a credit transaction in which a payment is scheduled more than fifteen (15) years after the extension of credit;
- (b) Insurance issued as an isolated transaction on the part of the insurer not related to an agreement or plan for insuring debtors of the creditor; or
- (c) Insurance indemnifying the creditor against loss due to the debtor's default.

(2) “Credit Insurance Act” means chapter 23, title 41, Idaho Code.

History.

I.C., § 28-44-103, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

Section 41-2302 states that the short title of chapter 23, title 41, Idaho Code, is "the model law for the regulation of credit life insurance and credit liability insurance."

28-44-104. Creditor's provision of and charge for insurance — Excess amount of charge. — (1) Except as otherwise provided in this chapter and subject to the provision on maximum [finance] charges, section 28-42-201, Idaho Code, a creditor may agree to provide insurance, and may contract for and receive a charge for insurance separate from and in addition to other charges. A creditor need not make a separate charge for insurance provided or required by him. This act does not authorize the issuance of any insurance prohibited under any statute, or rule thereunder, governing the business of insurance.

(2) The excess amount of a charge for insurance provided for in agreements in violation of this chapter is an excess charge for the purposes of the provisions of the chapter on remedies and penalties, chapter 45, title 28, Idaho Code, and of the provisions of the chapter on administration, chapter 46, title 28, Idaho Code, as to civil actions by the administrator, section 28-46-113, Idaho Code.

History.

I.C., § 28-44-104, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The bracketed insertion in the first sentence in subsection (1) was added by the compiler to make the reference more specific.

The term "this act" refers to S.L. 1983, ch. 119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

28-44-105. Conditions applying to insurance to be provided by creditor. — If a creditor agrees with a debtor to provide insurance:

(1) The insurance shall be evidenced by an individual policy, certificate of insurance, application or notice of proposed insurance, disclosed to debtor pursuant to the provisions of section 41-2308, Idaho Code; or

(2) The creditor shall promptly notify the debtor of any failure or delay in providing the insurance.

History.

I.C., § 28-44-105, as added by 1983, ch. 119, § 3, p. 264.

28-44-106. Unconscionability. — (1) In applying the provisions of this act on unconscionability, sections 28-45-106 and 28-46-111, Idaho Code, to a

separate charge for insurance, consideration shall be given, among other factors, to:

- (a) Potential benefits to the debtor including the satisfaction of his obligations;
- (b) The creditor's need for the protection provided by the insurance; and
- (c) The relation between the amount and terms of credit granted and the insurance benefits provided.

(2) If credit insurance otherwise complies with this chapter and other applicable law, neither the amount nor the term of the insurance nor the amount of a charge therefor is in itself unconscionable.

History.

I.C., § 28-44-106, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

119, which is compiled as chs. 41 to 49 of this title and § 41-2005.

28-44-107. Maximum charge by creditor for insurance. — (1) Except as provided in subsection (2) of this section, if a creditor contracts for or receives a separate charge for insurance, the amount charged to the debtor for the insurance may not exceed the premium to be charged by the insurer, as computed at the time the charge to the debtor is determined, conforming to any rate filings required by law and made by the insurer with the director of the department of insurance.

(2) A creditor who provides credit insurance in relation to open-end consumer credit, as defined in section 28-41-301, Idaho Code, may calculate the charge to the debtor in each billing cycle by applying the current premium rate to:

- (a) The average daily unpaid balance of the debt in the cycle;
- (b) The unpaid balance of the debt or a median amount within a specified range of unpaid balances of debt on approximately the same day of the cycle. The day of the cycle need not be the day used in calculating the finance charge, section 28-42-201, Idaho Code, but the specified range shall be the range used for that purpose; or
- (c) The unpaid balances of principal calculated according to the actuarial method.

History.

I.C., § 28-44-107, as added by 1983, ch. 119, § 3, p. 264; am. 2013, ch. 54, § 12, p. 108.

STATUTORY NOTES

Cross References.

Director of department of insurance, § 41-202.

tuted "as defined in" for "subsection (25) of" near the beginning of the introductory paragraph of subsection (2).

Amendments.

The 2013 amendment, by ch. 54, substi-

28-44-108. Refund or credit required — Amount. — (1) Upon prepayment in full of a regulated consumer credit sale or regulated consumer loan by the proceeds of credit insurance, the debtor or his estate is entitled to a refund of any portion of a separate charge for insurance which by reason of prepayment is retained by the creditor or returned to him by the insurer, unless the charge was computed from time to time on the basis of the balances of the debtor's account.

(2) This chapter does not require a creditor to grant a refund or credit to the debtor if all refunds and credits due to the debtor under this chapter amount to less than five dollars (\$5.00), and except as provided in subsection (1) of this section, does not require the creditor to account to the debtor for any portion of a separate charge for insurance because:

(a) The insurance is terminated by performance of the insurer's obligation;

(b) The creditor pays or accounts for premiums to the insurer in amounts and at times determined by the agreement between them; or

(c) The creditor receives directly or indirectly under any policy of insurance a gain or advantage not prohibited by law, or regulations prescribed by the director of the department of insurance.

(3) Except as provided in subsection (2) of this section, the creditor shall promptly make or cause to be made an appropriate refund or credit to the debtor with respect to any separate charge made to him for insurance if:

(a) The insurance is not provided or is provided for a shorter term than that for which the charge to the debtor for insurance was computed; or

(b) The insurance terminates prior to the end of the term for which it was written because of prepayment in full or otherwise.

(4) A refund or credit required by subsection (3) of this section is appropriate as to amount if it is computed according to a method prescribed or approved by the director of the department of insurance or a formula filed by the insurer with the director of the department of insurance at least thirty (30) days before the debtor's right to a refund or credit becomes determinable, unless the method or formula is employed after the director of the department of insurance notifies the insurer that he disapproves it.

History.

I.C., § 28-44-108, as added by 1983, ch. 119, § 3, p. 264; am. 1993, ch. 42, § 1, p. 114.

STATUTORY NOTES

Cross References.

Director of department of insurance, § 41-202.

Effective Dates.

Section 2 of S.L. 1993, ch. 42 declared an emergency. Approved March 16, 1993.

28-44-109. Existing insurance — Choice of insurer. — If a creditor requires insurance, upon notice to the creditor, the debtor, as provided in section 41-2313, Idaho Code, shall have the option of providing the required insurance through an existing policy of insurance owned or controlled by the debtor, or through a policy to be obtained and paid for by the debtor, but the

creditor may for reasonable cause, as defined in section 41-1312, Idaho Code, decline the insurance provided by the debtor.

History.

I.C., § 28-44-109, as added by 1983, ch. 119, § 3, p. 264.

28-44-110. Charge for insurance in connection with a deferral, refinancing, or consolidation — Duplicate charges. — (1) A creditor may not contract for or receive a separate charge for insurance in connection with a deferral, section 28-42-302, Idaho Code, a refinancing, section 28-42-303, Idaho Code, or a consolidation, section 28-42-304, Idaho Code, unless:

- (a) The debtor agrees at or before the time of the deferral, refinancing, or consolidation that the charge may be made;
- (b) The debtor is or is to be provided with insurance for an amount or a term, or insurance of a kind, in addition to that to which he would have been entitled had there been no deferral, refinancing, or consolidation;
- (c) The debtor receives a refund or credit on account of any unexpired term of existing insurance in the amount that would be required if the insurance were terminated, section 28-44-108, Idaho Code; and
- (d) The charge does not exceed the amount permitted by this chapter, section 28-44-107, Idaho Code.

(2) A creditor may not contract for or receive a separate charge for insurance which duplicates insurance with respect to which the creditor has previously contracted for or received a separate charge.

History.

I.C., § 28-44-110, as added by 1983, ch. 119, § 3, p. 264.

28-44-111. Cooperation between departments. — The director of the department of finance and the director of the department of insurance are authorized and directed to consult and assist one another in maintaining compliance with this chapter. They may jointly pursue investigations, prosecute suits, and take other official action, as may seem to them appropriate, if either of them is otherwise empowered to take the action. If the director [of the department of finance] is informed of a violation or suspected violation by an insurer of this chapter, or of the insurance laws, rules, and regulations of this state, he shall advise the director of the department of insurance of the circumstances.

History.

I.C., § 28-44-111, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

Director of department of insurance, § 41-202.

Compiler's Notes.

The bracketed insertion in the last sentence was added by the compiler to clarify the referenced term.

PART 2. CREDIT INSURANCE

28-44-201. Term of insurance. — (1) Credit insurance provided by a creditor may be subject to the furnishing of evidence of insurability satisfactory to the insurer. Whether or not such evidence is required, the term of the insurance shall commence no later than when the debtor becomes obligated to the creditor or when the debtor applies for the insurance, whichever is later, except as follows:

(a) If any required evidence of insurability is not furnished until more than thirty (30) days after the term would otherwise commence, the term may commence on the date when the insurer determines the evidence to be satisfactory; or

(b) If the creditor provides insurance not previously provided covering debts previously created, the term may commence on the effective date of the policy.

(2) The originally scheduled term of the insurance shall extend at least until the due date of the last scheduled payment of the debt except as follows:

(a) If the insurance relates to an open-end consumer credit account, the term need only extend until the payment of the debt under the account and may be sooner terminated after at least thirty (30) days notice to the debtor; or

(b) If the debtor is advised in writing that the insurance will be written for a specified shorter time, the term need only extend until the end of the specified time.

(3) The term of the insurance shall not extend more than fifteen (15) days after the originally scheduled due date of the last scheduled payment of the debt unless it is extended without additional cost to the debtor or as an incident to a deferral, refinancing, or consolidation.

History.

I.C., § 28-44-201, as added by 1983, ch. 119, § 3, p. 264.

28-44-202. Amount of insurance. — (1) Except as provided in subsection (2) of this section:

(a) In the case of credit insurance providing life coverage on an individual policy basis, the amount of insurance may not initially exceed the debt and, if the debt is payable in installments, may not at any time exceed the greater of the scheduled or actual amount of the debt. The amount of insurance provided under a group life insurance contract shall be subject

to the applicable provisions of sections 41-2005 (debtor groups) and 41-2306 (amount of insurance), Idaho Code; or

(b) In the case of any other credit insurance, the total amount of periodic benefits payable may not exceed the total of scheduled unpaid installments of the debt, and the amount of any periodic benefit may not exceed the original amount of debt divided by the number of periodic installments in which it is payable.

(2) If credit insurance is provided in connection with an open-end consumer credit account, the amounts payable as insurance benefits may be reasonably commensurate with the amount of debt as it exists from time to time. If credit insurance is provided in connection with a commitment to grant credit in the future, the amounts payable as insurance benefits may be reasonably commensurate with the total from time to time of the amount of debt and the amount of the commitment. The amount of all group life insurance issued under this subsection shall further be subject to the applicable provisions of sections 41-2005 (debtor groups), 41-2306 (amount of insurance), and 41-2308 (provisions of policies and certificates of insurance — disclosure to debtors), Idaho Code.

History.

I.C., § 28-44-202, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

28-44-203. Filing and approval of rates and forms. — (1) A creditor may not use a form or a schedule of premium rates or charges, the filing of which is required by this section, if the director of the department of insurance has disapproved the form or schedule and has notified the insurer of his disapproval. A creditor may not use a form or schedule unless:

(a) The form or schedule has been on file with the director of the department of insurance for thirty (30) days, or has earlier been approved by him; and

(b) The insurer has complied with this section with respect to the insurance.

(2) Except as provided in subsection (3) of this section, all policies, certificates of insurance, notices of proposed insurance, applications for insurance, endorsements and riders relating to credit insurance delivered or issued for delivery in this state, and the schedules of premium rates or charges pertaining thereto, shall be filed by the insurer with the director of the department of insurance. Within thirty (30) days after the filing of any form or schedule, he shall disapprove it if the premium rates or charges are unreasonable in relation to the benefits provided under the form, or if the form contains provisions which are unjust, unfair, inequitable, or deceptive, or encourage misrepresentation of the coverage, or are contrary to any

provision of the Credit Insurance Act or of any rule or regulation promulgated thereunder.

(3) If a group policy has been delivered in another state, the forms to be filed by the insurer with the director of the department of insurance are the group certificates and notices of proposed insurance. He shall approve them if:

(a) They provide the information that would be required if the group policy were delivered in this state; and

(b) The applicable premium rates or charges do not exceed those established by his rules or regulations.

History.

I.C., § 28-44-203, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Credit Insurance Act, § 28-44-103 and notes thereto. Director of department of insurance, § 41-202.

PART 3. PROPERTY AND LIABILITY INSURANCE

28-44-301. Property insurance. — (1) A creditor may not contract for or receive a separate charge for insurance against loss of or damage to property unless the creditor qualifies under chapter 9, title 41, Idaho Code, or rule or regulation prescribed by the director of the department of insurance and:

(a) The insurance covers a substantial risk of loss of or damage to property related to the credit transaction;

(b) The amount, terms, and conditions of the insurance are reasonable in relation to the character and value of the property insured or to be insured; and

(c) The term of the insurance is reasonable in relation to the terms of credit.

(2) The term of the insurance is reasonable if it is customary and does not extend substantially beyond a scheduled maturity.

(3) A creditor may not contract for or receive a separate charge for insurance against loss of or damage to property unless the amount financed or principal exclusive of charges for the insurance is five hundred dollars (\$500) or more, and the value of the property is five hundred dollars (\$500) or more.

History.

I.C., § 28-44-301, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Director of department of insurance, § 41-202.

28-44-302. Insurance on creditor's interest only. — If a creditor contracts for or receives a separate charge for insurance against loss of or damage to property, the risk of loss or damage not willfully caused by the debtor is on the debtor only to the extent of any deficiency in the effective coverage of the insurance, even though the insurance covers only the interest of the creditor.

History.

I.C., § 28-44-302, as added by 1983, ch. 119, § 3, p. 264.

28-44-303. Liability insurance. — A creditor may not contract for or receive a separate charge for insurance against liability unless the insurance covers a substantial risk of liability arising out of the ownership or use of property related to the credit transaction.

History.

I.C., § 28-44-303, as added by 1983, ch. 119, § 3, p. 264.

28-44-304. Cancellation by creditor. — A creditor shall not request cancellation of a policy of property or liability insurance except after the debtor's default or in accordance with a written authorization by the debtor, and in either case the cancellation does not take effect until written notice is delivered to the debtor or mailed to him at his address as stated by him. The notice shall state that the policy may be cancelled on a date not less than ten (10) days after the notice is delivered or, if the notice is mailed, not less than thirteen (13) days after it is mailed.

History.

I.C., § 28-44-304, as added by 1983, ch. 119, § 3, p. 264.

PART 4. INSURANCE PURSUANT TO A PREMIUM FINANCE LOAN

28-44-401. Cancellation of insurance pursuant to a premium finance loan. — (1) With respect to a premium finance loan, the debtor may give the lender authority to cancel insurance contracts obtained for the debtor pursuant to the premium finance loan agreement.

(2) A lender may not cancel unless he gives the debtor fifteen (15) days' written notice that cancellation of a specified insurance contract will become effective on a stated date and at a stated time unless the debtor before that date cures his default with respect to the premium finance loan. The debtor may cure his default by paying to the lender the amount of the installment payments due, without acceleration of the unpaid balance of the principal, at the time notice is given, together with the amount of delinquency or deferral charges due at that time.

(3) Upon cancellation the lender shall rebate or refund to the debtor the amount of any unearned loan finance charge. The amount of the rebate shall be equal to the amount of the unearned loan finance charge that would have

been rebated or refunded pursuant to section 28-42-307, Idaho Code, if the loan had been prepaid in full at the date of cancellation.

(4) All laws of this state relating to cancellation of insurance contracts must be complied with when cancellation occurs pursuant to this section.

(5) If the insurance contract cancelled provides motor vehicle liability insurance:

(a) The notice of cancellation shall briefly inform the debtor of the consequences under the laws of this state of operating a motor vehicle without liability insurance; and

(b) A copy of the notice of cancellation shall be sent to the Idaho transportation department.

History.

I.C., § 28-44-401, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Transportation department, § 40-501 et seq.

CHAPTER 45

REMEDIES AND PENALTIES

PART 1. LIMITATIONS ON CREDITORS' REMEDIES

SECTION.

28-45-101. Short title.

28-45-102. Scope.

28-45-103. Restrictions on deficiency judgments.

28-45-104. Limitation on garnishment.

28-45-105. No discharge from employment for garnishment.

28-45-106. Unconscionability.

28-45-107. Default.

28-45-108. Creditor's right to take possession after default.

28-45-109. Extortionate extensions of credit.

PART 2. DEBTORS' REMEDIES

28-45-201. Effect of violations on rights of parties.

SECTION.

28-45-202. Damages or penalties as setoff to obligation.

28-45-203. Civil liability for violation of disclosure provisions.

PART 3. LIMITATIONS ON DEBTORS' LIABILITIES

28-45-301. Limitation on default charges.

28-45-302. Assignee subject to claims and defenses.

PART 4. CRIMINAL PENALTIES

28-45-401. Willful and knowing violations.

28-45-402. Disclosure violations.

PART 1. LIMITATIONS ON CREDITORS' REMEDIES

28-45-101. Short title. — This chapter shall be known and may be cited as Idaho Credit Code — Remedies and Penalties.

History.

I.C., § 28-45-101, as added by 1983, ch. 119, § 3, p. 264.

28-45-102. Scope. — This part applies to actions or other proceedings to

enforce rights arising from regulated consumer credit transactions, to extortionate extensions of credit, section 28-45-109, Idaho Code, and to unconscionability, section 28-45-106, Idaho Code.

History.

I.C., § 28-45-102, as added by 1983, ch. 119, § 3, p. 264.

28-45-103. Restrictions on deficiency judgments. — (1) This section applies to a regulated consumer credit sale of goods or services.

(2) If the seller repossesses or voluntarily accepts surrender of goods which were the subject of the sale and in which he has a security interest and the cash price of the goods repossessed or surrendered was one thousand dollars (\$1,000) or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale of the goods, and the seller is not obligated to resell the collateral.

(3) If the seller repossesses or voluntarily accepts surrender of goods which were not the subject of the sale but in which he has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the cash price of the sale was one thousand dollars (\$1,000) or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale.

(4) For the purpose of determining the unpaid balance of consolidated debts or debts pursuant to open-end consumer credit, the allocation of payments to a debt shall be determined in the same manner as provided for determining the amount of debt secured by various security interests[,] section 28-43-303, Idaho Code.

(5) The buyer may be liable in damages to the seller if the buyer has wrongfully damaged the collateral or if, after default and demand, the buyer has wrongfully failed to make the collateral available to the seller.

(6) If the seller elects to bring an action against the buyer for a debt arising from a regulated consumer credit sale of goods or services, when under this section he would not be entitled to a deficiency judgment if he repossessed the collateral, and obtains judgment:

- (a) He may not repossess the collateral; and
- (b) The collateral is not subject to levy or sale on execution or similar proceedings pursuant to the judgment.

History.

I.C., § 28-45-103, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The bracketed comma near the end of subsection (4) was inserted by the compiler.

28-45-104. Limitation on garnishment. — (1) For the purposes of this part:

- (a) "Disposable earnings" means that part of the earnings of an individual

remaining after the deduction from those earnings of amounts required by law to be withheld; and

(b) "Garnishment" means any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of a debt.

(2) The maximum part of the aggregate disposable earnings of an individual for any work week which is subject to garnishment to enforce payment of a judgment arising from a regulated consumer credit sale or regulated consumer loan may not exceed the lesser of:

(a) Twenty-five percent (25%) of his disposable earnings for that week; or

(b) The amount by which his disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938, U.S.C. title 29, section 206(a)(1), in effect at the time the earnings are payable.

(c) In the case of earnings for a pay period other than a week, the director of the department of labor shall prescribe by rule a multiple of the federal minimum hourly wage equivalent in effect to that set forth in paragraph (b).

(3) No court may make, execute, or enforce an order or process in violation of this section.

History.

I.C., § 28-45-104, as added by 1983, ch. 119, § 3, p. 264; am. 1996, ch. 421, § 22, p. 1406; am. 2000, ch. 267, § 1, p. 754.

28-45-105. No discharge from employment for garnishment. — No employer shall discharge an employee for the reason that a creditor of the employee has subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings directed to the employer for the purpose of paying a judgment arising from a regulated consumer credit transaction.

History.

I.C., § 28-45-105, as added by 1983, ch. 119, § 3, p. 264.

28-45-106. Unconscionability. — (1) With respect to a regulated consumer credit sale, or regulated consumer loan, if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at the time it was made the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this act is not in itself unconscionable.

History.

I.C., § 28-45-106, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The term "this act" refers to S.L. 1983, ch.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

28-45-107. Default. — An agreement of the parties to a regulated consumer credit transaction with respect to default on the part of the debtor is enforceable only to the extent that:

- (1) The debtor fails to make a payment as required by agreement; or
- (2) The prospect of payment, performance, or realization of collateral is significantly impaired; the burden of establishing the prospect of significant impairment is on the creditor.

History.

I.C., § 28-45-107, as added by 1983, ch. 119, § 3, p. 264.

28-45-108. Creditor's right to take possession after default. — Upon default by a debtor with respect to a regulated consumer credit transaction, unless the debtor voluntarily surrenders possession of the collateral to the creditor, the creditor may take possession of the collateral without judicial process only if possession can be taken without entry into a dwelling and without the use of force or other breach of the peace.

History.

I.C., § 28-45-108, as added by 1983, ch. 119, § 3, p. 264.

28-45-109. Extortionate extensions of credit. — If it is the understanding of the creditor and the debtor at the time an extension of credit is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of the debtor(s) or of another person, the repayment of the extension of credit is unenforceable through civil judicial processes against the debtor.

History.

I.C., § 28-45-109, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The "s" enclosed in parentheses so appeared in the law as enacted.

PART 2. DEBTORS' REMEDIES

28-45-201. Effect of violations on rights of parties. — (1) If a

creditor has violated any provision of this act applying to collection of an excess charge or amount or enforcement of rights, subsection (4) of section 28-41-201, Idaho Code, authority to make regulated consumer loans, section 28-46-301, Idaho Code, restrictions on interests in land as security, section 28-43-309, Idaho Code, limitations on the schedule of payments or loan terms for regulated consumer loans, section 28-43-310, Idaho Code, attorney's fees, section 28-43-311, Idaho Code, receipts, statements of account, and evidences of payment, section 28-43-204, Idaho Code, form of insurance premium loan agreement, section 28-43-205, Idaho Code, security in sales, section 28-43-301, Idaho Code, no assignments of earnings, section 28-43-304, Idaho Code, certain negotiable instruments prohibited, section 28-43-306, Idaho Code, referral sales, section 28-43-308, Idaho Code, limitations on default charges, section 28-45-301, Idaho Code, assignees subject to claims and defenses, subsection (3) of section 28-45-302, Idaho Code, or assurance of discontinuance, section 28-46-109, Idaho Code, the debtor has a cause of action to recover actual damages and also a right in an action other than a class action, to recover from the person violating this act a penalty in an amount determined by the court not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000). With respect to violations arising from consumer credit sales or consumer loans made pursuant to open-end credit, no action pursuant to this subsection may be brought more than two (2) years after the violations occurred. With respect to violations arising from other regulated consumer credit transactions, no action pursuant to this subsection may be brought more than one (1) year after the scheduled or accelerated maturity of the debt.

(2) A debtor is not obligated to pay a charge in excess of that allowed by this act and has a right of refund of any excess charge paid. A refund may be made by reducing the debtor's obligation by the amount of the excess charge. If the debtor has paid an amount in excess of the lawful obligation under the agreement, the debtor may recover the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against debtors arising from the debt.

(3) If a creditor has contracted for or received a charge in excess of that allowed by this act, or if a debtor is entitled to a refund and a person liable to the debtor refuses to make a refund within a reasonable time after demand, the debtor may recover from the creditor or the person liable in an action other than a class action a penalty in an amount determined by the court not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000). With respect to excess charges arising from consumer credit sales or consumer loans made pursuant to open-end credit, no action pursuant to this subsection may be brought more than two (2) years after the violation or passage of a reasonable time for refund occurs. With respect to excess charges arising from other regulated consumer credit transactions, no action pursuant to this subsection may be brought more than one (1) year after the scheduled or accelerated maturity of the debt. For purposes of this subsection, a reasonable time is presumed to be thirty (30) days.

(4) Except as otherwise provided, a violation of this act does not impair rights on a debt.

(5) If an employer discharges an employee in violation of the provisions prohibiting discharge, section 28-45-105, Idaho Code, the employee within ninety (90) days may bring a civil action for recovery of wages lost as a result of the violation and for an order requiring reinstatement of the employee. Damages recoverable shall not exceed lost wages for six (6) weeks.

(6) A creditor is not liable for a penalty under subsection (1) or (3) of this section if he notifies the debtor of a violation before the creditor receives from the debtor written notice of the violation or the debtor has brought an action under this section, and the creditor corrects the violation within forty-five (45) days after notifying the debtor. If the violation consists of a prohibited agreement, giving the debtor a corrected copy of the writing containing the violation is sufficient notification and correction. If the violation consists of an excess charge, correction shall be made by an adjustment or refund. The administrator and any official or agency of this state having supervisory authority over a supervised financial organization shall give prompt notice to a creditor of any violation discovered pursuant to an examination or investigation of the transactions, business, records, and acts of the creditor, sections 28-46-305, 28-46-105 and 28-46-106, Idaho Code.

(7) A creditor may not be held liable in an action brought under this section for a violation of this act if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(8) In an action in which it is found that a creditor has violated this act, the court shall award to the debtor the costs of the action and his attorney's fees. In determining the attorney's fees, the amount of the recovery on behalf of the debtor is not controlling.

History.

I.C., § 28-45-201, as added by 1983, ch. 119, § 3, p. 264; am. 2002, ch. 301, § 3, p. 858.

STATUTORY NOTES**Cross References.**

Director of department of finance as administrator, § 28-46-103.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

Compiler's Notes.

The words "this act" refer to S.L. 1983, ch.

28-45-202. Damages or penalties as setoff to obligation. — Damages or penalties to which a debtor is entitled pursuant to this part may be set off against the debtor's obligation, and may be raised as a defense to an action on the obligation without regard to the time limitations prescribed by this part.

History.

I.C., § 28-45-202, as added by 1983, ch. 119, § 3, p. 264.

28-45-203. Civil liability for violation of disclosure provisions. —

(1) Except as otherwise provided in this section, a creditor who, in violation of the provisions of the Federal Consumer Credit Protection Act other than the provisions concerning advertising of credit terms, fails to disclose information to a person entitled to the information under this act is liable to that person to the same extent to which said creditor is liable to such person under the Federal Consumer Credit Protection Act.

(2) An obligor or debtor has all rights under this act that he has under the Federal Consumer Credit Protection Act concerning a right of rescission as to certain transactions. A creditor or other person has all liabilities and defenses under this section that he had under the Federal Consumer Credit Protection Act.

(3) An action may not be brought under this section more than one (1) year after the date of the occurrence of the violation.

(4) The liability of a creditor under this section is in lieu of and not in addition to his liability under the Federal Consumer Credit Protection Act. An action by a person with respect to a violation may not be maintained pursuant to this section if a final judgment has been rendered for or against that person with respect to the same violation pursuant to the Federal Consumer Credit Protection Act. If a final judgment has been rendered in favor of a person pursuant to this section and thereafter a final judgment with respect to the same violation is rendered in favor of the same person pursuant to the Federal Consumer Credit Protection Act, a creditor liable under both judgments has a cause of action against that person for appropriate relief to the extent necessary to avoid double liability with respect to the same violation.

History.

I.C., § 28-45-203, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Federal References.**

The federal Consumer Credit Protection Act, referred to in this section, is compiled as 15 U.S.C.S. § 1601 et seq.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch. 119, compiled as chs. 41 to 49 of this title and § 41-2005.

PART 3. LIMITATIONS ON DEBTORS' LIABILITIES

28-45-301. Limitation on default charges. — Except for reasonable expenses incurred in realizing on a security interest, the agreement with respect to a regulated consumer credit transaction may not provide for any charges as a result of default by the debtor except those authorized by this act. A provision in violation of this section is unenforceable.

History.

I.C., § 28-45-301, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

OPINIONS OF ATTORNEY GENERAL

Late Charges.

Late charges may be lawfully imposed on open-end credit accounts as part of the finance charge, but late charges can only be

imposed on interest-bearing consumer credit transactions if the transaction is a precomputed loan or a loan secured by an interest in real property. OAG 87-11.

28-45-302. Assignee subject to claims and defenses. — (1) With respect to a regulated consumer credit sale, an assignee of the rights of the seller is subject to all claims and defenses of the debtor against the seller arising from the sale of property or services, notwithstanding that:

(a) There is an agreement to the contrary; or

(b) The assignee is a holder in due course of a negotiable instrument issued in violation of the provisions on prohibition of certain negotiable instruments, section 28-43-306, Idaho Code.

(2) The assignee's liability under subsection (1) of this section may not exceed the amount owing to the assignee with respect to the sale at the time the assignee has notice of a claim or defense of the buyer. If debts arising from two (2) or more regulated consumer credit sales, other than pursuant to an open-end credit account, are consolidated, payments received after the consolidation are deemed, for the purpose of determining the amount owing the assignee with respect to a sale, to have been first applied to the payment of debts arising from the sales first made; if the debts consolidated arose from sales made on the same day, payments are deemed to have been first applied to the smallest debt. Payments received upon an open-end consumer credit account are deemed, for the purpose of determining the amount owing the assignee with respect to a sale, to have been first applied to the payment of finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries to the account showing the debts were made.

(3) An agreement may not provide for greater rights for an assignee than this section permits.

History.

I.C., § 28-45-302, as added by 1983, ch. 119, § 3, p. 264.

PART 4. CRIMINAL PENALTIES

28-45-401. Willful and knowing violations. — (1) A regulated lender who willfully and knowingly makes charges in excess of those permitted by the chapter on finance charges and related provisions, chapter 42, title 28, Idaho Code, applying to regulated consumer loans is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding five hundred dollars (\$500) or to imprisonment not exceeding one (1) year, or both.

(2) A person who, in violation of the provisions of this act applying to authority to make regulated consumer loans, section 28-46-301, Idaho Code, willfully and knowingly engages in the business of making regulated consumer loans, or of taking assignments of and undertaking direct collection of payments from and enforcement of rights against debtors arising from regulated consumer loans, is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding five hundred dollars (\$500), or to imprisonment not exceeding one (1) year, or both.

History.

I.C., § 28-45-401, as added by 1983, ch. 119, § 3, p. 264; am. 2006, ch. 122, § 3, p. 340.

STATUTORY NOTES**Amendments.**

The 2006 amendment, by ch. 122, deleted “without a license” following “knowingly engages” in subsection (2), and deleted former subsection (3), which read: “A person who willfully and knowingly engages in the business of entering into regulated consumer credit transactions, or of taking assignments of rights against debtors arising therefrom and undertaking direct collection of payments or enforcement of these rights, without complying with the provisions of this act concerning notification, section 28-46-202, Idaho Code, or payment of fees, section 28-46-203,

Idaho Code, is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding five hundred dollars (\$500).”

Compiler’s Notes.

The term “this act” refers to S.L. 1983, ch. 119, compiled as chs. 41 to 49 of this title and § 41-2005.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-45-402. Disclosure violations. — (1) A person is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding five thousand dollars (\$5,000), or to imprisonment not exceeding one (1) year, or both, if he willfully and knowingly:

- (a) Gives false or inaccurate information or fails to provide information which he is required to disclose under the Federal Consumer Credit Protection Act;
- (b) Uses any rate table or chart, the use of which is authorized by the provisions of the Federal Consumer Credit Protection Act, in a manner which consistently understates the annual percentage rate determined according to those provisions; or
- (c) Otherwise fails to comply with any requirement of the provisions on disclosure of the Federal Consumer Credit Protection Act.

(2) The criminal liability of a person under this section is in lieu of and not in addition to his criminal liability under the Federal Consumer Credit Protection Act; no prosecution of a person with respect to the same violation may be maintained pursuant to both this section and the Federal Consumer Credit Protection Act.

History.

I.C., § 28-45-402, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Federal References.

The federal Consumer Credit Protection

Act, referred to in this section, is compiled as
15 U.S.C.S. § 1601 et seq.**CHAPTER 46****ADMINISTRATION****PART 1. POWERS AND FUNCTIONS OF ADMINISTRATOR**

SECTION.

- 28-46-101. Short title.
- 28-46-102. Applicability.
- 28-46-103. Administrator.
- 28-46-104. Powers of administrator — Reliance on rules — Duty to report.
- 28-46-105. Administrative powers with respect to supervised financial organizations.
- 28-46-106. Investigatory powers.
- 28-46-107. Application of Administrative Procedure Act.
- 28-46-108. Administrative enforcement orders.
- 28-46-109. Assurance of discontinuance.
- 28-46-110. Injunctions against violations of act.
- 28-46-111. Injunctions against unconscionable agreements and fraudulent or unconscionable conduct including debt collection.
- 28-46-112. Temporary relief.
- 28-46-113. Civil actions by administrator.
- 28-46-114. Jury trial.
- 28-46-115. Debtors' remedies not affected.
- 28-46-116. Venue.

PART 2. NOTIFICATION AND FEES

- 28-46-201. Applicability. [Repealed.]
- 28-46-202. Notification. [Repealed.]
- 28-46-203. Fees and taxes. [Repealed.]

PART 3. REGULATED LENDERS — LICENSING AND RELATED PROVISIONS

- 28-46-301. Authority to make regulated consumer loans — Exemption from licensing.

SECTION.

- 28-46-302. License to make regulated consumer loans.
- 28-46-303. Revocation or suspension of license.
- 28-46-304. Records — Annual reports.
- 28-46-305. Examinations and investigations.
- 28-46-306. Application of Administrative Procedure Act to part.

PART 4. PAYDAY LOANS

- 28-46-401. Definitions.
- 28-46-402. License required.
- 28-46-403. Qualifications for payday loan license.
- 28-46-404. Application for payday loan license.
- 28-46-405. Denial of license.
- 28-46-406. Nontransferability — Change in control.
- 28-46-407. Suspension or revocation of license.
- 28-46-408. Reports to administrator.
- 28-46-409. Records — Annual reports.
- 28-46-410. Examinations and investigations.
- 28-46-411. Application of administrative procedure act.
- 28-46-412. Payday loan procedures.
- 28-46-413. Payday loan business practices.

PART 5. TITLE LOAN ACT

- 28-46-501. Short title.
- 28-46-502. Definitions.
- 28-46-503. License required.
- 28-46-504. Title loan agreements.
- 28-46-505. Disclosure.
- 28-46-506. Renewal of title loan agreements.
- 28-46-507. Default.
- 28-46-508. Prohibited actions.
- 28-46-509. Exemption.

PART 1. POWERS AND FUNCTIONS OF ADMINISTRATOR

28-46-101. Short title. — This chapter shall be known and may be cited as Idaho Credit Code — Administration.

History.

I.C., § 28-46-101, as added by 1983, ch. 119, § 3, p. 264.

28-46-102. Applicability. — This part applies to persons who in this state:

(1) Make or solicit regulated consumer credit transactions, as defined in section 28-41-301, Idaho Code; or

(2) Directly collect payments from or enforce rights against debtors arising from regulated consumer credit transactions, as defined in section 28-41-301, Idaho Code, wherever they are made; or

(3) Are designated in this act as regulated lenders.

History.

I.C., § 28-46-102, as added by 1983, ch. 119, § 3, p. 264; am. 2013, ch. 54, § 13, p. 108.

STATUTORY NOTES

Amendments.

The 2013 amendment, by ch. 54, substituted “as defined in” for “subsection (33) of” in subsections (1) and (2).

Compiler’s Notes.

The term “this act” refers to S.L. 1983, ch. 119 compiled as chs. 41 to 49 of this title and § 41-2005.

28-46-103. Administrator. — “Administrator” means the director of the department of finance of the state of Idaho.

History.

I.C., § 28-46-103, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

28-46-104. Powers of administrator — Reliance on rules — Duty to report. — (1) In addition to other powers granted by this act, the administrator within the limitations provided by law may:

(a) Receive and act on complaints, take action designed to obtain voluntary compliance with this act, or commence proceedings on his own initiative;

(b) Counsel persons and groups on their rights and duties under this act;

(c) Establish programs for the education of debtors with respect to credit practices and problems;

(d) Make studies appropriate to effectuate the purposes and policies of this act and make the results available to the public;

(e) Adopt, amend, and repeal rules to carry out the specific provisions of this act, but not with respect to unconscionable agreements or fraudulent or unconscionable conduct; and

(f) Appoint any necessary attorneys, hearing examiners, clerks, and other employees and agents and fix their compensation, and authorize attorneys appointed under this section to appear for and represent the administrator in court.

(2) In addition to other powers granted by this act, the administrator

shall have the power to enforce the Federal Consumer Credit Protection Act, except to the extent otherwise provided by law.

(3) Except for refund of an excess charge, no liability is imposed under this act for an act done or omitted in conformity with a rule, interpretation, or declaratory ruling of the administrator, notwithstanding that after the act or omission, the rule, interpretation, or ruling is amended or repealed or is determined by judicial or other authority to be invalid for any reason.

History.

I.C., § 28-46-104, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Federal References.

The federal Consumer Credit Protection Act, referred to in subsection (2) of this section, is compiled as 15 U.S.C.S. § 1601 et seq.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch. 119, compiled as chs. 41 to 49 of this title and § 41-2005.

28-46-105. Administrative powers with respect to supervised financial organizations. — (1) With respect to supervised financial organizations, the powers of examination and investigation, sections 28-46-106 and 28-46-305, Idaho Code, and administrative enforcement, section 28-46-108, Idaho Code, shall be exercised by the official or agency to whose supervision the organization is subject. All other powers of the administrator under this act may be exercised by him with respect to a supervised financial organization including nationally chartered financial organizations.

(2) If the administrator receives a complaint or other information concerning noncompliance with this act by a supervised financial organization, he shall inform the official or agency having supervisory authority over the organization concerned. The administrator may request information about supervised financial organizations from the officials or agencies supervising them.

(3) The administrator and any official or agency of this state having supervisory authority over a supervised financial organization are authorized and directed to consult and assist one another in maintaining compliance with this act. They may jointly pursue investigations, prosecute suits, and take other official action, as they deem appropriate, if either of them otherwise is empowered to take the action.

History.

I.C., § 28-46-105, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

28-46-106. Investigatory powers. — (1) If the administrator has cause to believe that a person has engaged in conduct or committed an act that is subject to action by the administrator, he may make an investigation to determine whether the person has engaged in the conduct or committed the act. To the extent necessary for this purpose, he may administer oaths or affirmations, and, upon his own motion or upon request of any party, subpoena witnesses, compel their attendance, adduce evidence, and require the production of, or testimony as to, any matter relevant to the investigation, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence.

(2) If the person's records are located outside this state, the person at his option shall make them available to the administrator at a convenient location within this state or pay the reasonable and necessary expenses for the administrator or his representative to examine them where they are located. The administrator may designate representatives, including comparable officials of the state in which the records are located, to inspect them on his behalf.

(3) Upon application by the administrator showing failure without lawful excuse to obey a subpoena or to give testimony, and upon reasonable notice to all persons affected thereby, the court shall grant an order compelling compliance.

(4) The name or identity of a person whose acts or conduct the administrator investigates pursuant to this section or the facts disclosed in the investigation shall be subject to disclosure according to chapter 3, title 9, Idaho Code, but this subsection does not apply to disclosures in actions or enforcement proceedings pursuant to this act.

History. 119, § 3, p. 264; am. 1990, ch. 213, § 24, p. I.C., § 28-46-106, as added by 1983, ch. 480.

STATUTORY NOTES

Cross References.
Administrator, § 28-46-103.

Compiler's Notes.
The term "this act" refers to S.L. 1983, ch. 119, compiled as chs. 41 to 49 of this title and § 41-2005.

Effective Dates.
Section 111 of S.L. 1990, ch. 213, as amended by § 16 of S.L. 1991, ch. 329, provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

28-46-107. Application of Administrative Procedure Act. — Except as otherwise provided, the Administrative Procedure Act applies to and governs all administrative action taken by the administrator pursuant to this chapter.

History.

I.C., § 28-46-107, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES**Compiler's Notes.**

The Administrative Procedure Act, referred

to in this section, is compiled as § 67-5201 et seq.

28-46-108. Administrative enforcement orders. — (1) After notice and hearing the administrator may order a creditor or a person acting in his behalf to cease and desist from violating this act. A respondent aggrieved by an order of the administrator may obtain judicial review of the order and the administrator may obtain an order of the court for enforcement of his order in the district court. The proceeding for review or enforcement is initiated by filing a petition in the court. Copies of the petition shall be served upon all parties of record.

(2) Within thirty (30) days after service of the petition for review upon the administrator, or within any further time the court allows, the administrator shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including any transcript of testimony, which need not be printed. By stipulation of all parties to the review proceeding, the record may be shortened. After hearing, the court may:

- (a) Reverse or modify the order if the findings of fact of the administrator are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
- (b) Grant temporary relief or restraining order it deems just; and
- (c) Enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the administrator, or remanding the case to the administrator for further proceedings.

(3) An objection not urged at the hearing shall not be considered by the court unless the failure to urge the objection is excused for good cause shown. A party may move the court to remand the case to the administrator in the interest of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon upon good cause shown for the failure to adduce this evidence before the administrator.

(4) The jurisdiction of the court shall be exclusive and its final judgment or decree is subject to review by the supreme court in the same manner and form and with the same effect as in appeals from a final judgment or decree. The administrator's copy of the testimony shall be available at reasonable times to all parties for examination without cost.

(5) A proceeding for review under this section shall be initiated within thirty (30) days after a copy of the order of the administrator is received. If no proceeding is so initiated, the administrator may obtain an order of the court for enforcement of his order upon showing that his order was issued in compliance with this section, that no proceeding for review was initiated within thirty (30) days after a copy of the order was received, and that the respondent is subject to the jurisdiction of the court.

(6) With respect to unconscionable agreements or fraudulent or unconscionable conduct by a regulated lender, the administrator may not issue an

order pursuant to this section but may bring a civil action for an injunction, section 28-46-111, Idaho Code, or any other action which the administrator is authorized to bring under this act.

(7) With respect to unconscionable agreements or fraudulent or unconscionable conduct by an unlicensed person who is required to be licensed under section 28-46-301, Idaho Code, the administrator may issue a cease and desist order without prior notice or hearing, and may bring a civil action for an injunction, or any other action which the administrator is authorized to bring under this act.

History.

I.C., § 28-46-108, as added by 1983, ch.

119, § 3, p. 264; am. 2002, ch. 301, § 4, p. 858; am. 2006, ch. 122, § 4, p. 340.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, substituted “a regulated lender” for “persons licensed to make registered consumer loans” in subsection (6) and inserted “who is required to be licensed under section 28-46-301, Idaho Code” in subsection (7).

Compiler’s Notes.

The term “this act” refers to S.L. 1983, ch. 119, compiled as chs. 41 to 49 of this title and § 41-2005.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-109. Assurance of discontinuance. — If it is claimed that a person has engaged in conduct which could be subject to an order by the administrator, sections 28-46-108 and 28-46-303, Idaho Code, or by a court, sections 28-46-110, 28-46-111 and 28-46-112, Idaho Code, the administrator may accept an assurance in writing that the person will not engage in the same or similar conduct in the future. The assurance may include any of the following: stipulations for the voluntary payment by the creditor of the costs of investigation or of an amount to be held in escrow as restitution to debtors aggrieved by past or future conduct of the creditor or to cover costs of future investigation, or admissions of past specific acts by the creditor or that those acts violated this act or other statutes. A violation of an assurance of discontinuance is a violation of this act. If a person giving an assurance of discontinuance fails to comply with its terms, the assurance is evidence that prior to the assurance he engaged in the conduct described in the assurance.

History.

I.C., § 28-46-109, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

Compiler’s Notes.

The term “this act” refers to S.L. 1983, ch.

28-46-110. Injunctions against violations of act. — The administra-

tor may bring a civil action to restrain any person from violating this act and for other appropriate relief including, but not limited to, the following: to prevent a person from using or employing practices prohibited by this act, to reform contracts to conform to this act and to rescind contracts into which a creditor has induced a debtor to enter by conduct violating this act, even though a debtor is not a party to the action. An action under this section may be joined with an action under the provisions on civil actions by the administrator, section 28-46-113, Idaho Code.

History.

I.C., § 28-46-110, as added by 1983, ch. 119,
§ 3, p. 264.

STATUTORY NOTES**Cross References.**

Administrator, § 28-46-103.

119, compiled as chs. 41 to 49 of this title and
§ 41-2005.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

28-46-111. Injunctions against unconscionable agreements and fraudulent or unconscionable conduct including debt collection. —

(1) The administrator may bring a civil action to restrain a person to whom this part applies from engaging in a course of:

- (a) Making or enforcing unconscionable terms or provisions of regulated consumer credit transactions;
- (b) Fraudulent or unconscionable conduct in inducing debtors to enter into regulated consumer credit transactions;
- (c) Conduct of any of the types specified in paragraph (a) or (b) of this subsection, with respect to transactions that give rise to or that lead persons to believe will give rise to regulated consumer credit transactions;
or
- (d) Fraudulent or unconscionable conduct in the collection of debts arising from regulated consumer credit transactions.

(2) In an action brought pursuant to this section, the court may grant relief only if it finds:

- (a) That the respondent has made unconscionable agreements or has engaged or is likely to engage in a course of fraudulent or unconscionable conduct;
- (b) That the respondent's agreements have caused or are likely to cause, or the conduct of the respondent has caused or is likely to cause, injury to debtors; and
- (c) That the respondent has been able to cause or will be able to cause the injury primarily because the transactions involved are consumer credit transactions.

(3) In applying this section, consideration shall be given to each of the following factors, among others:

- (a) Belief by the creditor at the time regulated consumer credit transactions are made that there was no reasonable probability of payment in full of the obligation by the debtor;

- (b) In the case of regulated consumer credit sales, knowledge by the seller at the time of the sale of the inability of the buyer to receive substantial benefits from the property or services sold;
 - (c) In the case of regulated consumer credit sales, gross disparity between the price of the property or services sold and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like buyers;
 - (d) The fact that the creditor contracted for or received separate charges for insurance with respect to regulated consumer credit sales or regulated consumer loans with the effect of making the sales or loans, considered as a whole, unconscionable; and
 - (e) The fact that the respondent has knowingly taken advantage of the inability of the debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.
- (4) In an action brought pursuant to this section, a charge or practice expressly permitted by this act is not in itself unconscionable.

History.

I.C., § 28-46-111, as added by 1983, ch. 119,
§ 3, p. 264.

STATUTORY NOTES**Cross References.**

Administrator, § 28-46-103.

119 compiled as chs. 41 to 49 of this title and
§ 41-2005.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

28-46-112. Temporary relief. — With respect to an action brought to enjoin violations of the act, section 28-46-110, Idaho Code, or unconscionable agreements or fraudulent or unconscionable conduct, section 28-46-111, Idaho Code, the administrator may apply to the court for appropriate temporary relief against a respondent, pending final determination of proceedings. If the court finds after a hearing held upon notice to the respondent that there is reasonable cause to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained, it may grant any temporary relief or restraining order it deems appropriate.

History.

I.C., § 28-46-112, as added by 1983, ch. 119,
§ 3, p. 264.

STATUTORY NOTES**Cross References.**

Administrator, § 28-46-103.

28-46-113. Civil actions by administrator. — (1) After demand, the administrator may bring a civil action against a creditor to recover actual damages sustained and excess charges paid by one (1) or more debtors who

have a right to recover explicitly granted by this act. In a civil action under this subsection, penalties may not be recovered by the administrator. The court shall order amounts recovered under this subsection to be paid to each debtor or set off against his obligation. A debtor's action, except a class action, takes precedence over a prior or subsequent action by the administrator with respect to the claim of that debtor. A debtor's class action takes precedence over a subsequent action by the administrator with respect to claims common to both actions, but the administrator may intervene. An administrator's action on behalf of a class of debtors takes precedence over a debtor's subsequent class action with respect to claims common to both actions. Whenever an action takes precedence over another action under this subsection, the latter action may be stayed to the extent appropriate while the precedent action is pending and dismissed if the precedent action is dismissed with prejudice or results in a final judgment granting or denying the claim asserted in the precedent action. A defense available to a creditor in a civil action brought by a debtor is available to him in a civil action brought under this subsection.

(2) The administrator may bring a civil action against a creditor or a person acting in his behalf to recover a civil penalty of no more than five thousand dollars (\$5,000) for repeatedly and intentionally violating this act. A civil penalty pursuant to this subsection may not be imposed for a violation of this act occurring more than two (2) years before the action is brought.

History.

I.C., § 28-46-113, as added by 1983, ch. 119,

§ 3, p. 264; am. 2002, ch. 301, § 5, p. 858; am. 2006, ch. 122, § 5, p. 340.

STATUTORY NOTES**Cross References.**

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, deleted former subsection (3), which read: "The administrator may bring a civil action against a creditor for failure to file notification in accordance with the provisions on notification, section 28-46-202, Idaho Code, or to pay fees in accordance with the provisions on fees, section 28-46-203, Idaho Code, to recover the fees the defendant has failed to pay and a civil penalty in an amount determined by the court

not exceeding the greater of three (3) times the amount of fees the defendant has failed to pay or one thousand dollars (\$1,000), plus the administrator's costs and attorney's fees."

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch. 119, compiled as chs. 41-49 of this title and § 41-2005.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-114. Jury trial. — The administrator has no right to trial by jury in an action brought by him under this act.

History.

I.C., § 28-46-114, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, deleted former subsection (3), which read: "The administrator may bring a civil action against a creditor for failure to file notification in accordance with the provisions on notification, section 28-46-202, Idaho Code, or to pay fees in accordance with the provisions on fees, section 28-46-203, Idaho Code, to recover the fees

the defendant has failed to pay and a civil penalty in an amount determined by the court not exceeding the greater of three (3) times the amount of fees the defendant has failed to pay or one thousand dollars (\$1,000), plus the administrator's costs and attorney's fees."

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch. 119, compiled as chs. 41 to 49 of this title and § 41-2005.

28-46-115. Debtors' remedies not affected. — The grant of powers to the administrator in this chapter does not affect remedies available to debtors under this act or under other principles of law or equity.

History.

I.C., § 28-46-115, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

28-46-116. Venue. — The administrator may bring actions or proceedings in a court in a county in which an act on which the action or proceeding is based occurred or in a county in which the respondent resides or transacts business.

History.

I.C., § 28-46-116, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

PART 2. NOTIFICATION AND FEES

28-46-201. Applicability. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 28-46-201, as added by 1983, ch. 119, § 3, p. 264,

was repealed by S.L. 2006, ch. 122, § 6, effective January 1, 2006.

28-46-202. Notification. [Repealed.]**STATUTORY NOTES****Compiler's Notes.**

This section, which comprised I.C., § 28-46-202, as added by 1983, ch. 119, § 3, p. 264;

am. 1995, ch. 99, § 25, p. 299, was repealed by S.L. 2006, ch. 122, § 6, effective January 1, 2006.

28-46-203. Fees and taxes. [Repealed.]**STATUTORY NOTES****Compiler's Notes.**

This section, which comprised I.C., § 28-46-203, as added by 1983, ch. 119, § 3, p. 264;

am. 1984, ch. 47, § 13, p. 76; am. 1995, ch. 99, § 26, p. 299, was repealed by S.L. 2006, ch. 122, § 6, effective January 1, 2006.

PART 3. REGULATED LENDERS — LICENSING AND RELATED PROVISIONS

28-46-301. Authority to make regulated consumer loans — Exemption from licensing. — (1) The administrator shall receive and act on all applications for licenses to make regulated consumer loans under this act. Applications shall be filed in the manner prescribed by the administrator and shall contain such information as the administrator may reasonably require. Unless a person is exempt under federal law or under this section or has first obtained a license from the administrator authorizing him to make regulated consumer loans, he shall not engage in the business of:

- (a) Making regulated consumer loans; or
- (b) Taking assignments of and undertaking direct collection of payments from or enforcement of rights against debtors arising from regulated consumer loans.

(2) Any "supervised financial organization," as defined in section 28-41-301, Idaho Code, or any person organized, chartered, or holding an authorization certificate under the laws of another state to engage in making loans and receiving deposits, including a savings, share, certificate, or deposit account and who is subject to supervision by an official or agency of the other state, shall be exempt from the licensing requirements of this section.

(3) Mortgage lenders licensed under the Idaho residential mortgage practices act, chapter 31, title 26, Idaho Code, shall be exempt from the licensing requirements of this section as to mortgage lending activities defined in chapter 31, title 26, Idaho Code.

(4) Agencies of the United States and agencies of this state and its political subdivisions shall be exempt from the licensing requirements of this section.

History.

I.C., § 28-46-301, as added by 1983, ch. 119, § 3, p. 264; am. 1995, ch. 99, § 27, p. 299;

am. 2006, ch. 122, § 7, p. 340; am. 2008, ch. 312, § 1, p. 861; am. 2013, ch. 54, § 3, p. 108.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, added the subsection (1) designation; in subsection (1), rewrote the second sentence, which formerly read: "Applications shall be filed in the manner prescribed by the administrator, shall contain such information as the administrator may reasonably require, and shall be accompanied by the fee required by subsection (5) of section 28-46-305, Idaho Code"; and added subsection (2).

The 2008 amendment, by ch. 312, added subsection (3).

The 2013 amendment, by ch. 54, added "Exemption from licensing" at the end of the section heading; substituted "section 28-41-301" for "section 28-41-301(45)" in subsection (2); and added subsection (4).

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch. 119 compiled as chs. 41 to 49 of this title and § 41-2005.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-302. License to make regulated consumer loans. — (1) The administrator shall receive and act on all applications for a license to do business as a regulated lender. Applications shall be filed in the manner prescribed by the administrator, shall contain such information as the administrator may reasonably require, shall be updated as necessary to keep the information current, and shall be accompanied by an application fee of three hundred fifty dollars (\$350). When an application for licensure is denied or withdrawn, the administrator shall retain all fees paid by the applicant. The administrator may deny an application for a license if the administrator finds that:

- (a) The financial responsibility, character, and fitness of the applicant, and of the officers and directors thereof (if the applicant is a corporation) are not such as to warrant belief that the business will be operated honestly and fairly within the purposes of this act;
- (b) The applicant does not maintain at least thirty thousand dollars (\$30,000) in liquid assets, as determined in accordance with generally accepted accounting principles, available for the purpose of making loans under this chapter;
- (c) The applicant has had a license, substantially equivalent to a license under this chapter and issued by any state, denied, revoked or suspended under the law of such state;
- (d) The applicant has filed an application for a license which is false or misleading with respect to any material fact;
- (e) The application does not contain all of the information required by the administrator; or
- (f) The application is not accompanied by an application fee of three hundred fifty dollars (\$350).

(2) A licensee under this chapter shall meet the requirements of subsection (1) of this section at all times while licensed pursuant to this chapter. The administrator is empowered to conduct investigations as he may deem necessary, to enable him to determine the existence of the requirements set out in subsection (1) of this section.

(3) Upon written request, the applicant is entitled to a hearing on the question of his qualifications for a license if:

- (a) The administrator has notified the applicant in writing that his application has been denied, or objections filed; or
- (b) The administrator has not issued a license within sixty (60) days after the application for the license was filed.

If a hearing is held, the applicant and those filing objections shall reimburse, pro rata, the administrator for his reasonable and necessary expenses incurred as a result of the hearing. A request for a hearing may not be made more than fifteen (15) days after the administrator has mailed a writing to the applicant notifying him that the application has been denied and stating in substance the administrator's finding supporting denial of the application or that objections have been filed and the substance thereof.

(4) The administrator may issue additional licenses to the same licensee upon application by the licensee, in the manner prescribed by the administrator, and payment of the required application fee. A separate license shall be required for each place of business. Each license shall remain in full force and effect unless the licensee does not satisfy the renewal requirements of subsection (8) of this section, or the license is relinquished, suspended or revoked.

(5) No licensee shall change the location of any place of business, or consolidate, or close any locations, without giving the administrator at least fifteen (15) days' prior written notice.

(6) A licensee shall not engage in the business of making regulated consumer loans at any place of business for which he does not hold a license nor shall he engage in business under any other name than that in the license.

(7) A license application shall be deemed withdrawn and void if an applicant submits an incomplete license application and, after receipt of a written notice of the application deficiency, fails to provide the director with information necessary to complete the application within sixty (60) days of receipt of the deficiency notice. A written deficiency notice shall be deemed received by a license applicant when:

- (a) Placed in regular U.S. mail by the director or his agent using an address provided by the applicant on the license application; or
- (b) E-mailed to the applicant using an e-mail address provided by the applicant on the license application; or
- (c) Posted by the director or his agent on the NMLSR if the license application was submitted through the NMLSR.

(8) On or before May 31 of each year, every licensee under this chapter shall pay a nonrefundable annual license renewal fee of one hundred fifty dollars (\$150) per licensed location, and shall file with the administrator a renewal form containing such information as the administrator may require. Notwithstanding the provisions of section 67-5254, Idaho Code, a license issued under this part automatically expires if not timely renewed according to the requirements of this section. Notwithstanding the provisions of section 67-5254, Idaho Code, branch licenses issued under this part also expire upon the expiration, relinquishment or revocation of a license issued under this part to a licensee's designated home office.

(9) For a period of time not to exceed sixty (60) days following license expiration, the director may reinstate an expired license if he finds that the

applicant meets the requirements for licensure under this part and the applicant has submitted to the director:

- (a) A complete application for renewal;
- (b) The fees required to apply for license renewal unless previously paid for the period for which the license renewal applies; and
- (c) A reinstatement fee of two hundred dollars (\$200).

History.

I.C., § 28-46-302, as added by 1983, ch. 119, § 3, p. 264; am. 1984, ch. 47, § 14, p. 76; am. 1998, ch. 74, § 1, p. 271, p. 271; am. 1999,

ch. 275, § 1, p. 688; am. 2006, ch. 122, § 8, p. 340; am. 2008, ch. 312, § 2, p. 862; am. 2013, ch. 54, § 4, p. 108.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, rewrote the introductory paragraph of subsection (1), which formerly read: "No application for license shall be denied if the administrator finds that"; inserted "not" in subsection (1)(a); rewrote subsection (1)(b), which formerly read: "The applicant has at least thirty thousand dollars (\$30,000) available for the purpose of making loans"; added subsections (1)(c) to (f); in subsection (2), added the first sentence and substituted "subsection (1)" for "subsections (1)(a) and (1)(b)" near the end; in subsection (3), substituted "subsection (1)(a) or (b)" for "subsection (1) or (2)" and deleted "and subsection (5) of section 28-46-305, Idaho Code" preceding "shall apply to persons"; in subsection (5), substituted "application" for "notification" and inserted "application" in the first sentence preceding "fee" and substituted "unless the licensee does not satisfy the renewal requirements of subsection (8) of this section, or the license is relinquished" for "until surrendered" in the last sentence; and added subsection (8).

The 2008 amendment, by ch. 312, deleted former subsection (3), which read: "The director may issue a license under this act to a

mortgage lender licensed under chapter 31, title 26, Idaho Code, and who is engaged in the business described in subsection (1)(a) or (b) of section 28-46-301, Idaho Code. All provisions of this act, except subsections (1) and (2) of this section, shall apply to persons seeking a license pursuant to this subsection" and redesignated the subsequent subsections accordingly; and deleted the last sentence in subsection (5), which read: "No licensee shall change the location of any of his places of business to a location more than five (5) miles from the original location or outside the original municipality, if any."

The 2013 amendment, by ch. 54, added subsections (7) and (9) and redesignated former subsection (7) as subsection (8), conforming the references in subsection (4) to that redesignation.

Compiler's Notes.

The term "this act" in paragraph (1)(a) refers to S.L. 1983, ch. 119 compiled as chs. 41 to 49 of this title and § 41-2005.

The words in parentheses so appeared in the law as enacted.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-303. Revocation or suspension of license. — (1) The administrator may issue to a person licensed to make regulated consumer loans an order to show cause why his license should not be revoked or suspended for a period not in excess of six (6) months. The order shall state the place for a hearing and set a time for the hearing that is no less than ten (10) days from the date of the order. After the hearing, the administrator shall revoke or suspend the license if he finds that:

- (a) The licensee has repeatedly and willfully violated this act or any rule or order lawfully made pursuant to this act; or
- (b) Facts or conditions exist which would clearly have justified the administrator in refusing to grant a license had these facts or conditions

existed or been known to exist at the time the application for the license was made.

(2) No revocation or suspension of a license is lawful unless prior to institution of revocation or suspension proceedings by the administrator, notice is given to the licensee of the facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for retention of the license.

(3) If the administrator finds that probable cause for revocation of a license exists and that enforcement of this act requires immediate suspension of the license pending investigation, he may, after a hearing upon five (5) days' written notice, enter an order suspending the license for not more than thirty (30) days.

(4) Whenever the administrator revokes or suspends a license, he shall enter an order to that effect and forthwith notify the licensee of the revocation or suspension. Within five (5) days after the entry of the order, he shall deliver to the licensee a copy of the order and the findings supporting the order.

(5) Any person holding a license to make regulated consumer loans may relinquish the license by notifying the administrator in writing of its relinquishment, but this relinquishment shall not affect his liability for acts previously committed.

(6) No revocation, suspension, or relinquishment of a license shall impair or affect the obligation of any preexisting lawful contract between the licensee and any debtor.

(7) The administrator may reinstate a license, terminate a suspension, or grant a new license to a person whose license has been revoked or suspended if no fact or condition then exists which clearly would have justified the administrator in refusing to grant a license.

History.

I.C., § 28-46-303, as added by 1983, ch. 119, § 3, p. 264; am. 2006, ch. 122, § 9, p. 340.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

Amendments.

The 2006 amendment, by ch. 122, inserted "existed or" in subsection (1)(b).

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

28-46-304. Records — Annual reports. — (1) Every regulated lender shall maintain records in conformity with generally accepted accounting principles and practices in a manner that will enable the administrator to determine whether the regulated lender is complying with the provisions of this act. The recordkeeping system of a regulated lender shall be sufficient if he makes the required information reasonably available. The records need not be kept in the place of business where regulated consumer loans are

made, if the administrator is given free access to the records wherever located. The records pertaining to any loan need not be preserved for more than two (2) years after making the final entry relating to the loan, but in the case of an open-end account, the two (2) years is measured from the date of each entry.

(2) Concurrent with license renewal, on or before May 31 of each year, every licensee shall file with the administrator a composite annual report for the prior calendar year in the form prescribed by the administrator relating to all regulated consumer loans made by him. Information contained in annual reports shall be subject to disclosure according to chapter 3, title 9, Idaho Code, and may be published only in composite form.

History.

I.C., § 28-46-304, as added by 1983, ch. 480; am. 1990, ch. 213, § 25, p. 119, § 3, p. 264; am. 2006, ch. 122, § 10, p. 340.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

Amendments.

The 2006 amendment, by ch. 122, substituted "regulated lender" for "licensee" three times in subsection (1) and added "Concurrent with license renewal" at the beginning of subsection (2).

Effective Dates.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-305. Examinations and investigations. — (1) The administrator may examine periodically at intervals he deems appropriate, the loans and business records of every regulated lender. In addition, for the purpose of discovering violations of this act or securing information lawfully required, the administrator may at any time investigate the loans, business, and records of any regulated lender. For these purposes, he shall have free and reasonable access to the offices, places of business, and records of the lender. The administrator, for purposes of examination of licensees herein, shall be paid the cost of examination by the licensee, within thirty (30) days of demand for payment. The administrator shall, on July 1 of each year, fix such per diem examination cost.

(2) If the regulated lender's records are located outside this state, the regulated lender, at his option, shall make them available to the administrator at a convenient location within this state, or pay the reasonable and necessary expenses for the administrator or his representative to examine them at the place where they are maintained. The administrator may designate representatives, including comparable officials of the state in which the records are located, to inspect them on his behalf.

(3) For the purposes of this section, the administrator may administer oaths or affirmations, and upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation,

including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence.

(4) Upon failure without lawful excuse to obey a subpoena or to give testimony and upon reasonable notice to all persons affected thereby, the administrator may apply to the district court for an order compelling compliance.

History.

I.C., § 28-46-305, as added by 1983, ch.

119, § 3, p. 264; am. 2006, ch. 122, § 11, p. 340.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, substituted “may examine” for “shall examine” in subsection (1); inserted “regulated” twice in subsection (2); and deleted former subsection (5), which read: “For purposes of investigation herein, each regulated lender applicant shall submit with his application the sum of one hundred dollars (\$100).”

Compiler’s Notes.

The term “this act” refers to S.L. 1983, ch. 119, compiled as chs. 41 to 49 of this title and § 41-2005.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-306. Application of Administrative Procedure Act to part. — Except as otherwise provided, the state Administrative Procedure Act, chapter 52, title 67, Idaho Code, applies to and governs all administrative action taken by the administrator pursuant to this part.

History.

I.C., § 28-46-306, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

PART 4. PAYDAY LOANS

28-46-401. Definitions. — (1) As used in this act, unless the context otherwise requires, “payday loan” means a transaction pursuant to a written agreement between a creditor and the maker of a check whereby the creditor:

- (a) Accepts a check from the maker;
- (b) Agrees to hold the check for a period of time prior to negotiation, deposit or presentment; and
- (c) Pays to the maker of the check the amount of the check, less the fee permitted by this chapter.

(2) Payday loans are regulated consumer credit transactions, and all provisions of the Idaho credit code relating to regulated loans apply to

payday loans and to persons engaged in the business of payday loans except for part 3, chapter 46, title 28, Idaho Code.

(3) As used in this section, "check" refers to a check or the electronic equivalent of a check.

History.

I.C., § 28-46-401, as added by 2003, ch. 182, § 1, p. 490.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2003, ch. 182, which is compiled as §§ 28-46-401 through 28-46-413.

RESEARCH REFERENCES

A.L.R. — State regulation of payday loans.
29 A.L.R.6th 461.

28-46-402. License required. — (1) No person shall engage in the business of payday loans, offer or make a payday loan, or arrange a payday loan for a third party lender in a payday loan transaction without having first obtained a license under this chapter. A separate license shall be required for each location from which such business is conducted.

(2) Any "supervised financial organization," as defined in section 28-41-301, Idaho Code, or any person organized, chartered, or holding an authorization certificate under the laws of another state to engage in making loans and receiving deposits, including a savings, share, certificate, or deposit account and who is subject to supervision by an official or agency of the other state, shall be exempt from the licensing requirements of this section.

(3) A payday loan made in this state in violation of the licensing requirement of this section is void, uncollectible and unenforceable. For any such payday loan the debtor is not obligated to pay the principal or any fee associated with such payday loan. If a debtor has paid any part of the principal or fee, the debtor has a right to recover the payment from the person violating the provisions of this section or from an assignee of that person's rights who undertakes direct collection of payments or enforcement of rights arising from the debt. In the event the administrator initiates an administrative or civil action against a person who has violated the provisions of this section, the administrator shall be entitled to recover the principal and fees received by such person in a payday loan transaction made in violation of the provisions of this section.

(4) If the administrator finds that a person subject to this part has violated, is violating, or that there is reasonable cause to believe that a person is about to violate the provisions of this part, or any rule promulgated under this act and pertinent to this part, the administrator may, in his discretion, order the person to cease and desist from the violations.

History.

I.C., § 28-46-402, as added by 2003, ch. 182, § 1, p. 490; am. 2006, ch. 122, § 12, p.

340; am. 2009, ch. 175, § 1, p. 555; am. 2013, ch. 54, § 14, p. 108.

STATUTORY NOTES**Cross References.**

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, added the subsection (1) designation and added subsection (2).

The 2009 amendment, by ch. 175, added subsections (3) and (4).

The 2013 amendment, by ch. 54, substituted "section 28-41-301, Idaho Code" for "section 28-41-301(45), Idaho Code" in subsection (2).

Compiler's Notes.

The term "this act" in subsection (4) refers to S.L. 2009, ch. 175, which is codified as this section. The reference probably should be to the Idaho Credit Code, which is generally compiled as chapters 41 to 49, title 28, Idaho Code.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-403. Qualifications for payday loan license. — (1) To qualify for a license, an applicant shall satisfy the following requirements:

(a) The applicant shall have liquid assets of at least thirty thousand dollars (\$30,000) determined in accordance with generally accepted accounting principles, provided that applicants seeking to engage in the business of payday loans at more than one (1) location in the state shall have liquid assets of at least an additional five thousand dollars (\$5,000) for each additional location in the state up to a maximum of seventy-five thousand dollars (\$75,000) for all locations in the state; and

(b) The financial responsibility, financial condition, business experience, character and general fitness of the applicant shall reasonably warrant the administrator's belief that the applicant's business will be conducted lawfully and fairly. In determining whether this qualification has been met, and for the purpose of investigating compliance with this act, the administrator may review:

(i) The relevant business records and the capital adequacy of the applicant;

(ii) The competence, experience, integrity and financial ability of any applicant, and if the applicant is an entity, of any person who is a member, partner, director, senior officer or twenty-five percent (25%) or more equity owner of the applicant; and

(iii) Any record of conviction, on the part of the applicant, or any person referred to in subparagraph (ii) of this paragraph, of any criminal activity; any fraud or other act of personal dishonesty; any act, omission or practice which constitutes a breach of a fiduciary duty; or any suspension, revocation, removal or administrative action by any agency or department of the United States or any state, from participation in the conduct of any business.

(2) The requirements set forth in subsection (1) of this section are continuing in nature. A licensee shall meet the requirements of this section at all times while licensed pursuant to this part 4.

History.

I.C., § 28-46-403, as added by 2003, ch. 182, § 1, p. 490; am. 2006, ch. 122, § 13, p. 340.

STATUTORY NOTES**Cross References.**

Administrator, § 28-46-103.

Compiler's Notes.

The term "this act" in paragraph (1)(b) refers to S.L. 2009, ch. 175, which is codified as this section. The reference probably should be to the Idaho Credit Code, which is generally compiled as chapters 41 to 49, title 28, Idaho Code.

Amendments.

The 2006 amendment, by ch. 122, deleted

"and approve" from the end of the introductory paragraph of subsection (1)(a); and rewrote subsection (2), which formerly read: "The requirements set forth in subsection (1) of this section are continuing in nature and may be reviewed periodically by the administrator."

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-404. Application for payday loan license. — (1) Each application for a license shall be in writing and under oath to the administrator, in a form prescribed by the administrator, and shall include at least the following:

- (a) The legal name, residence and business address of the applicant and, if the applicant is an entity, of every member, partner, director, senior officer or twenty-five percent (25%) or more equity owner of the applicant;
- (b) The location at which the principal place of business of the applicant is located; and
- (c) Other data and information the administrator may require with respect to the applicant, and if the applicant is an entity, such data and information of its members, partners, directors, senior officers, or twenty-five percent (25%) or more equity owners of the applicant.

(2) Each application for a license shall be accompanied by an application fee in the amount of three hundred fifty dollars (\$350). Such fee shall not be subject to refund.

(3) The fee set forth in subsection (2) of this section shall be required for each location for which an application is submitted.

(4) Within sixty (60) days of the filing of an application in a form prescribed by the administrator, accompanied by the fee required in subsection (2) of this section, the administrator shall investigate to ascertain whether the qualifications prescribed by subsection (1) of section 28-46-403, Idaho Code, have been satisfied. If the administrator finds that the qualifications have been satisfied and approves the documents, the administrator shall issue to the applicant a license to engage in the payday loan business.

(5) Notwithstanding the provisions of section 67-5254, Idaho Code, a license issued pursuant to this part automatically expires if not timely renewed according to the requirements of subsection (7) of this section, or the license is relinquished, suspended or revoked pursuant to this act. Notwithstanding the provisions of section 67-5254, Idaho Code, branch licenses issued under this part also expire upon the expiration, relinquishment or revocation of a license issued under this part to a licensee's designated home office.

(6) A license application shall be deemed withdrawn and void if an applicant submits an incomplete license application and, after receipt of a written notice of the application deficiency, fails to provide the director with information necessary to complete the application within sixty (60) days of receipt of the deficiency notice. A written deficiency notice shall be deemed received by a license applicant when:

- (a) Placed in regular U.S. mail by the director or his agent using an address provided by the applicant on the license application; or
- (b) E-mailed to the applicant using an e-mail address provided by the applicant on the license application; or
- (c) Posted by the director or his agent on the NMLSR if the license application was submitted through the NMLSR.

(7) On or before May 31 of each year, every licensee under this part 4 shall pay a nonrefundable annual license renewal fee of one hundred fifty dollars (\$150) per licensed location, and shall file with the administrator a renewal form containing such information as the administrator may require.

(8) For a period of time not to exceed sixty (60) days following license expiration, the director may reinstate an expired license if he finds that the applicant meets the requirements for licensure under this part and the applicant has submitted to the director:

- (a) A complete application for renewal;
- (b) The fees required to apply for license renewal unless previously paid for the period for which the license renewal applies; and
- (c) A reinstatement fee of two hundred dollars (\$200).

History.

I.C., § 28-46-404, as added by 2003, ch.

182, § 1, p. 490; am. 2006, ch. 122, § 14, p. 340; am. 2013, ch. 54, § 5, p. 108.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, substituted “fee in the amount of three hundred fifty dollars (\$350)” for “and investigation fee in an amount prescribed by the administrator” in the first sentence of subsection (2); rewrote subsection (5), which formerly read: “A license issued pursuant to this section shall remain in force and effect through the remainder of the calendar year after its date of issuance unless earlier surrendered, suspended or revoked pursuant to this act”; and added subsection (6).

The 2013 amendment, by ch. 54, rewrote subsection (5), which formerly read: “A license issued pursuant to this section shall remain

in full force and effect unless the licensee does not satisfy the renewal requirements of subsection (6) of this section, or the license is relinquished, suspended or revoked pursuant to this act”; added subsections (6) and (8); and redesignated former subsection (6) as subsection (7).

Compiler’s Notes.

The term “this act” in subsection (5) refers to S.L. 2009, ch. 175, which is codified as this section. The reference probably should be to the Idaho Credit Code, which is generally compiled as chapters 41 to 49, title 28, Idaho Code.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-405. Denial of license. — (1) If the administrator determines that an applicant is not qualified to receive a license, the administrator shall

notify the applicant in writing that the application has been denied, and shall state the basis for denial.

(2) If the administrator denies an application, or if the administrator fails to act on an application within sixty (60) days after the filing of a properly completed application, the applicant may make written demand to the administrator for a hearing on the question of whether the license should be granted. Written demand for a hearing may not be made more than fifteen (15) days after the administrator has mailed a writing to the applicant notifying him that the application has been denied and stating the basis for denial. In the event of a hearing, the administrator shall reconsider the application and, after the hearing, issue a written order granting or denying the application.

History.

I.C., § 28-46-405, as added by 2003, ch. 182, § 1, p. 490.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

28-46-406. Nontransferability — Change in control. — (1) Other than the transfer of a license to a new location as set forth in subsection (3) of this section, a license issued pursuant to this chapter is not transferable or assignable.

(2) The prior written approval of the administrator is required for the continued operation of a payday loan business whenever a change in control of a licensee is proposed. Control in the case of an entity means direct or indirect ownership, or the right to vote or otherwise control, twenty-five percent (25%) or more of the governance interests of the entity, or the ability of any person to elect a majority of the directors. The administrator may require information deemed necessary to determine whether a new application is required. Costs incurred by the administrator in investigating a change of control request shall be paid by the licensee requesting such approval.

(3) A licensee shall notify the administrator in writing at least fifteen (15) days before any proposed changes in the licensee's business location or name.

History.

I.C., § 28-46-406, as added by 2003, ch. 182, § 1, p. 490.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

28-46-407. Suspension or revocation of license. — (1) The admin-

istrator may, after notice and hearing, suspend or revoke any license if the administrator finds that the licensee:

- (a) Has knowingly or through the lack of due care failed to pay any fee imposed by the administrator under the authority of this act;
- (b) Has committed any fraud, engaged in any dishonest activities or made any misrepresentations;
- (c) Has violated any provision of this act or any rule or order lawfully made pursuant to this act or has violated any other law in the course of the licensee's dealing as a licensee;
- (d) Has made a materially false statement in the application for the license or failed to give a true reply to a question in the application; or
- (e) Has demonstrated incompetence or untrustworthiness to act as a licensee.

(2) If the reason for revocation or suspension of a licensee's license at any one (1) location is of general application to all locations operated by a licensee, the administrator may revoke or suspend all licenses issued to a licensee.

History.

I.C., § 28-46-407, as added by 2003, ch.

182, § 1, p. 490; am. 2006, ch. 122, § 15, p. 340.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Amendments.

The 2006 amendment, by ch. 122, substituted "any fee" for "the annual fee imposed by this act, or any examination fee" in subsection (1)(a).

Compiler's Notes.

The term "this act" in paragraph (1)(a)

refers to S.L. 2009, ch. 175, which is codified as this section. The reference probably should be to the Idaho Credit Code, which is generally compiled as chapters 41 to 49, title 28, Idaho Code.

Effective Dates.

Section 16 of S.L. 2006, ch. 122 declared an emergency retroactively to January 1, 2006. Approved March 22, 2006.

28-46-408. Reports to administrator. — Within fifteen (15) days of the occurrence of any of the events listed below, a licensee shall file a written report with the administrator describing such events and their expected impact on the activities of the licensee in the state:

- (1) The filing for bankruptcy or reorganization by the licensee;
- (2) The institution of revocation or suspension proceedings against the licensee by any state or governmental authority;
- (3) Any felony indictment of the licensee and, if the licensee is an entity, of any of its members, partners, directors, senior officers or twenty-five percent (25%) or more equity owners;
- (4) Any felony conviction of the licensee and, if the licensee is an entity, of any of its members, partners, directors, senior officers or twenty-five percent (25%) or more equity owners; and
- (5) Such other events as the administrator may determine and identify by rule.

History.

I.C., § 28-46-408, as added by 2003, ch. 182, § 1, p. 490.

STATUTORY NOTES**Cross References.**

Administrator, § 28-46-103.

28-46-409. Records — Annual reports. — (1) Every licensee shall maintain records in conformity with generally accepted accounting principles and practices in a manner that will enable the administrator to determine whether the licensee is complying with the provisions of this act. The recordkeeping system of a licensee shall be sufficient if he makes the required information reasonably available. The records need not be kept in the place of business where payday loans are made if the administrator is given free access to the records wherever located. The records pertaining to any loan need not be preserved for more than two (2) years after the due date of the loan.

(2) On or before May 31 of each year, every licensee shall file with the administrator a composite annual report for the prior calendar year in the form prescribed by the administrator relating to all payday loans made by him. Information contained in annual reports shall be subject to disclosure according to chapter 3, title 9, Idaho Code, and may be published only in composite form.

History.

I.C., § 28-46-409, as added by 2003, ch. 182, § 1, p. 490.

STATUTORY NOTES**Cross References.**

Administrator, § 28-46-103.

Compiler's Notes.

The term "this act" in subsection (1) refers

to S.L. 2009, ch. 175, which is codified as this section. The reference probably should be to the Idaho Credit Code, which is generally compiled as chapters 41 to 49, title 28, Idaho Code.

28-46-410. Examinations and investigations. — (1) The administrator shall examine periodically, at intervals he deems appropriate, the loans and business records of every payday lender. In addition, for the purpose of discovering violations of this act or securing information lawfully required, the administrator may at any time investigate the loans, business and records of any payday lender. For these purposes, the administrator shall have free and reasonable access to the offices, places of business, and records of the lender. The administrator, for purposes of examination of licensees herein, shall be paid the cost of examination by the licensee within thirty (30) days of demand for payment. The administrator shall, on July 1 of each year, fix such per diem examination cost.

(2) If the lender's records are located outside this state, the lender, at his option, shall make them available to the administrator at a convenient location within this state or pay the reasonable and necessary expenses for

the administrator or his representative to examine them at the place where they are maintained. The administrator may designate representatives, including comparable officials of the state in which the records are located, to inspect them on his behalf.

(3) For the purposes of this section, the administrator may administer oaths or affirmations and, upon his own motion or upon request of any party, may subpoena witnesses, compel the attendance of witnesses, adduce evidence and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition and location of any books, documents or other tangible items and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence.

(4) Upon failure without lawful excuse to obey a subpoena or to give testimony, and upon reasonable notice to all persons affected thereby, the administrator may apply to the district court for an order compelling compliance.

History.

I.C., § 28-46-410, as added by 2003, ch. 182, § 1, p. 490.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

to S.L. 2009, ch. 175, which is codified as this section. The reference probably should be to the Idaho Credit Code, which is generally compiled as chapters 41 to 49, title 28, Idaho Code.

Compiler's Notes.

The term "this act" in subsection (1) refers

28-46-411. Application of administrative procedure act. — Except as otherwise provided, the Idaho administrative procedure act, as set forth in chapter 52, title 67, Idaho Code, applies to and governs all administrative action taken by the administrator pursuant to this act.

History.

I.C., § 28-46-411, as added by 2003, ch. 182, § 1, p. 490.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

28-46-412. Payday loan procedures. — (1) Each payday loan must be documented in a written agreement signed by the borrower. The loan agreement must include the name of the licensee, the loan date, the principal amount of the loan, and a statement of the total amount of fees charged as a condition of making the loan, expressed both as a dollar amount and as an annual percentage rate (APR).

(2) The maximum principal amount of any payday loan is one thousand dollars (\$1000).

(3) A licensee may charge a fee for each payday loan. Such fee shall be deemed fully earned as of the date of the transaction and shall not be deemed interest for any purpose of law. No other fee or charges may be charged or collected for the payday loan except as specifically set forth in this act.

(4) Each licensee shall conspicuously post in each licensed location a notice of the fees, expressed as a dollar amount per one hundred dollars (\$100), charged for payday loans.

(5) Before disbursing funds pursuant to a payday loan, a licensee shall provide written notice to the borrower indicating the following:

(a) A payday loan is intended to address short-term, not long-term, financial needs.

(b) The borrower will be required to pay additional fees if the payday loan is renewed rather than paid in full when due.

(c) The borrower has the right to rescind the payday loan, at no cost, no later than the end of the next business day following the day on which the payday loan is made.

(6)(a) A payday loan may be made pursuant to a transaction whereby the licensee:

(i) Accepts a check from a borrower who is the maker of the check; and

(ii) Agrees not to negotiate, deposit or present the check for an agreed upon period of time and pays to the maker the amount of the check, less the fees permitted by this act.

(b) In such a transaction, the licensee may accept only one (1) postdated check for each loan as security for the loan. Before the licensee may negotiate or present a check for payment, the check shall be endorsed with the actual name under which the licensee is doing business. The borrower shall have the right to redeem the check from the licensee at any time prior to the presentment or deposit of the check by making payment to the licensee of the full amount of the check in cash or immediately available funds.

(7) The amount advanced to the borrower by the licensee in a payday loan may be paid to the borrower in the form of cash, the licensee's business check, a money order, an electronic funds transfer to the borrower's account, or other reasonable electronic payment mechanism, provided however, that no additional fee may be charged to the borrower by a licensee to access the proceeds of the payday loan.

(8) A payday loan may be repaid by the borrower in cash, by negotiation of the borrower's check in a transaction pursuant to subsection (6) of this section or, with the agreement of the licensee, a debit card, a cashier's check, an electronic funds transfer from the borrower's bank account, or any other reasonable electronic payment mechanism to which the parties may agree.

History.

I.C., § 28-46-412, as added by 2003, ch. 182, § 1, p. 490.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in this section refers to S.L. 2009, ch. 175, which is codified as this section. The reference probably should be to the Idaho Credit Code, which is generally

compiled as chapters 41 to 49, title 28, Idaho Code.

The abbreviation "APR" enclosed in parentheses so appeared in the law as enacted.

28-46-413. Payday loan business practices. — (1) No licensee or person related to a licensee by common control may have outstanding at any time to a single borrower a loan or loans with an aggregate principal balance exceeding one thousand dollars (\$1,000), plus allowable fees.

(2) No payday loan shall be repaid by the proceeds of another payday loan made by the same licensee or a person related to the licensee by common control.

(3) If the borrower's check is returned unpaid to the licensee from a payor financial institution, the licensee shall have the right to collect charges authorized by section 28-22-105, Idaho Code, provided such charges are disclosed in the loan agreement. A licensee may not charge treble damages. If the borrower's obligation is assigned to any third party for collection, the provisions of this section shall apply to such third party collector.

(4) A licensee, or person required to be licensed pursuant to this part, shall not threaten a borrower with criminal action as a result of any payment deficit.

(5) No licensee, or person required to be licensed pursuant to this part, shall engage in unfair or deceptive acts, practices or advertising in the conduct of a payday loan business.

(6) A licensee may renew a payday loan no more than three (3) consecutive times, after which the payday loan shall be repaid in full by the borrower. A borrower may enter into a new loan transaction with the licensee at any time after a prior loan to the borrower is completed. A loan secured by a borrower's check is completed when the check is presented or deposited by the licensee or redeemed by the borrower pursuant to section 28-46-412(6), Idaho Code.

(7) Other than a borrower's check in a transaction pursuant to section 28-46-412(6), Idaho Code, a licensee shall not accept any property, title to property, or other evidence of ownership as collateral for a payday loan.

(8) A licensee may conduct other business at a location where it engages in payday lending unless it carries on such other business for the purpose of evading or violating the provisions of this act.

(9) A borrower may rescind the payday loan at no cost at any time prior to the close of business on the next business day following the day on which the payday loan was made by paying the principal amount of the loan to the licensee in cash or other immediately available funds.

History.

I.C., § 28-46-413, as added by 2003, ch. 182, § 1, p. 490; am. 2013, ch. 54, § 6, p. 108.

STATUTORY NOTES

Amendments.

The 2013 amendment, by ch. 54, inserted “or person required to be licensed pursuant to this part” near the beginning of subsections (4) and (5).

to S.L. 2009, ch. 175, which is codified as this section. The reference probably should be to the Idaho Credit Code, which is generally compiled as chapters 41 to 49, title 28, Idaho Code.

Compiler’s Notes.

The term “this act” in subsection (8) refers

PART 5. TITLE LOAN ACT

28-46-501. Short title. — This part shall be known and may be cited as the “Title Loan Act.”

History.

I.C., § 28-46-501, as added by 2006, ch. 323, § 1, p. 1023.

28-46-502. Definitions. — As used in this part, unless the context otherwise requires:

(1) “Title lender” means a regulated lender authorized pursuant to this part to make title loans.

(2) “Title loan” means a loan for a consumer purpose that is secured by a nonpurchase money security interest in titled personal property and that is scheduled to be repaid in either a single installment or in multiple installments that are not fully amortized. Title loans are regulated consumer loans and, except as otherwise provided in this part, all provisions of the Idaho credit code relating to regulated consumer loans apply to title loans and to persons engaged in the business of making title loans.

(3) “Title loan agreement” means a written agreement whereby a title lender agrees to make a title loan to a debtor, and the debtor agrees to give the title lender a security interest in unencumbered titled personal property owned by the debtor. Except as otherwise provided in this part, all provisions of chapter 9, title 28, Idaho Code, apply to title loans and to persons engaged in the business of making title loans.

(4) “Titled personal property” means any motor vehicle, the ownership of which is evidenced and delineated by a state issued certificate of title, but does not include a motor home, mobile home or manufactured home.

History.

I.C., § 28-46-502, as added by 2006, ch. 323, § 1, p. 1023.

STATUTORY NOTES

Cross References.

Idaho credit code, § 28-41-101 and notes thereto.

28-46-503. License required. — (1) No person shall engage in the business of making title loans without having first obtained a license from

the administrator pursuant to this chapter authorizing the person to make regulated consumer loans.

(2) Any title loan made without first having obtained a license is void, in which case the person making the loan forfeits the right to collect any moneys, including principal, interest, and any other fee paid by the debtor in connection with the title loan agreement. The person making the title loan shall release its security interest in the titled personal property used as security for the title loan and shall return to the debtor:

- (a) The certificate of title for such titled personal property;
- (b) Such titled personal property if the person making the loan took possession of such property;
- (c) The fair market value of such titled personal property if the person making the loan took possession of such property and is not able to return such property; and
- (d) All principal, interest, and any other fees paid by the debtor.

History.

I.C., § 28-46-503, as added by 2006, ch. 323, § 1, p. 1023.

28-46-504. Title loan agreements. — (1) Every title lender shall keep a numbered record of each and every title loan agreement executed by the title lender and debtor. Such record, as well as the title loan agreement, shall include the following information:

- (a) The make, model and year of the titled personal property;
- (b) The vehicle identification number, or other comparable identification number, along with the license plate number, if applicable, of the titled personal property;
- (c) The name, residential address and date of birth of the debtor;
- (d) The date the title loan agreement is executed by the title lender and the debtor; and
- (e) The maturity date of the title loan agreement.

(2) The following information shall also be printed on the title loan agreement:

- (a) The name and physical address of the title loan office;
- (b) In not less than twelve (12) point bold type, the name and address of the administrator as well as a telephone number to which consumers may address complaints;
- (c) The following statement in not less than twelve (12) point bold type and in all capitalized letters:

“(1) This loan is not intended to meet long-term financial needs.

(2) You should use this loan only to meet short-term cash needs.

(3) You will be required to pay additional interest and fees if you renew this loan rather than pay the debt in full when due.

(4) This loan may be a higher interest loan. You should consider what other lower cost loans may be available to you.

(5) You are placing at risk your continued ownership of the titled personal property you are using as security for this loan.

(6) If you default under this loan the title lender may take possession

of the titled personal property used as security for this loan and sell the property in the manner provided by law.

(7) If you enter into a title loan agreement, you have a legal right of rescission. This means you may cancel your contract at no cost to you by returning the money you borrowed by the next business day after the date of your loan.

(8) If you believe that the title lender has violated the provisions of the Idaho Title Loan Act, you have the right to file a written complaint with the Idaho Department of Finance and the Department will investigate your complaint."

(d) The statement that "The debtor represents and warrants, to the best of the debtor's knowledge, that the titled personal property is not stolen and has no liens or encumbrances against it, the debtor has the right to enter into this transaction and will not apply for a duplicate certificate of title while the title loan agreement is in effect."

(3) The debtor shall sign the title loan agreement and shall be provided with a copy of such agreement. The title loan agreement shall also be signed by the title lender or the title lender's employee or agent. If the debtor has been issued a social security number, the title lender shall keep on file the social security number of the debtor.

History.

I.C., § 28-46-504, as added by 2006, ch. 323, § 1, p. 1023.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

Department of finance, § 67-2701 et seq.
Title loan act, § 28-46-501.

28-46-505. Disclosure. — (1) Notwithstanding the provisions of section 28-46-103, Idaho Code, or any other law to the contrary, in accordance with the Idaho administrative procedure act, chapter 52, title 67, Idaho Code, the administrator may promulgate rules requiring each title lender to issue a standardized consumer notification and disclosure form in compliance with federal truth-in-lending laws prior to entering into any title loan agreement. The required style, content and method of executing the form may be prescribed by the rule and shall be designed to ensure that the debtor, prior to entering into such agreement, receives and acknowledges an accurate and complete notification and disclosure of the itemized and total amounts of all interest, fees, charges and other costs that will or potentially could be imposed as a result of such agreement.

(2) A title lender shall conspicuously post in each licensed location the statements listed in section 28-46-504(2)(c), Idaho Code.

History.

I.C., § 28-46-505, as added by 2006, ch. 323, § 1, p. 1023.

STATUTORY NOTES

Cross References.

Administrator, § 28-46-103.

to in subsection (1), are compiled as 15
U.S.C.S. § 1601 et seq.**Federal References.**

The federal truth-in-lending laws, referred

28-46-506. Renewal of title loan agreements. — (1) Title loan agreements shall not exceed thirty (30) days in length. However, such agreements may provide for renewals, which may occur automatically, unless one (1) of the following has occurred:

- (a) The debtor has paid all principal and finance charges due in accordance with the title loan agreement;
- (b) The debtor has surrendered possession, title and all other interest in and to the titled personal property to the title lender; or
- (c) The title lender has notified the debtor in writing that the title loan agreement is not to be renewed.

(2) A debtor has the right to cancel the debtor's obligation to make payments under a title loan agreement until the close of the next business day after the day when the debtor signs a title loan agreement if the debtor returns the original check or cash to the location where the loan was originated. For the purpose of this section, "business day" means any day that the title loan office is open for business.

(3) Notwithstanding any provision of this part 5 to the contrary, beginning with the third renewal or continuation and at each successive renewal or continuation thereafter, the debtor shall be required to make a payment of at least ten percent (10%) of the principal amount of the original title loan in addition to any finance charges that are due. Finance charges due at each successive renewal or continuation shall be calculated on the outstanding principal balance. Principal payments in excess of the ten percent (10%) required principal reduction shall be credited to the outstanding principal on the day received. If at the maturity of any renewal requiring a principal reduction, the debtor has not made previous principal reductions adequate to satisfy the current required principal reduction, and the debtor cannot repay at least ten percent (10%) of the original principal balance and any outstanding finance charges, the title lender may, but shall not be obligated to, defer any required principal payment until a future date. No further finance charges may accrue on any such principal amount thus deferred.

(4) Within fourteen (14) days after a title loan is automatically renewed, the title lender shall provide the debtor written notice of the renewal either by personal delivery to the debtor or by deposit in the regular mail to the debtor's residential address listed in the title loan agreement. For the purpose of this section, a renewal is any extension of a title loan for an additional period without any change in the terms of the title loan other than extension of the maturity date and a reduction in principal.

History.

I.C., § 28-46-506, as added by 2006, ch.
323, § 1, p. 1023.

28-46-507. Default. — (1) Before exercising any of its rights upon a default by a debtor under a title loan agreement, the title lender shall mail a “Notice to Cure Default” to the debtor at the debtor’s last address shown in the title lender’s file, notifying the debtor that the debtor has ten (10) days from the date of the notice in which to cure the default.

(2) If the debtor does not cure the default within the ten (10) days, the title lender may proceed to exercise its rights under chapter 9, title 28, Idaho Code. There shall be no further finance charges assessed to the debtor after the title lender has obtained possession of the titled personal property.

(3) Upon voluntary surrender of the titled personal property used as security for a title loan, the title lender shall have no obligation to send any “Notice to Cure Default” to the debtor.

(4) Title lenders may assess and collect reasonable expenses of collection and enforcement as authorized by chapter 9, title 28, Idaho Code.

History.

I.C., § 28-46-507, as added by 2006, ch. 323, § 1, p. 1023.

28-46-508. Prohibited actions. — No title lender licensee under this part or person required under this part to have such license shall:

(1) Enter into a title loan agreement with a person less than eighteen (18) years of age, or with anyone who appears to be intoxicated;

(2) Make any agreement giving the title lender any recourse against the debtor other than the title lender’s right to take possession of the titled personal property and certificate of title upon the debtor’s default, and to sell or otherwise dispose of the titled personal property in accordance with the provisions of chapter 9, title 28, Idaho Code, except where the debtor prevented repossession of the vehicle, damaged or committed or permitted waste on the vehicle or committed fraud;

(3) Enter into a title loan agreement in which the amount of money loaned, when combined with the outstanding balance of other outstanding title loan agreements the debtor has with the same lender secured by any single titled personal property, exceeds the retail value of the titled personal property as determined by common motor vehicle appraisal guides;

(4) Accept any waiver, in writing or otherwise, of any right or protection accorded a debtor under this chapter;

(5) Fail to exercise reasonable care to protect from loss or damage the certificate of title in the physical possession of the title lender;

(6) Purchase titled personal property used as security for a title loan made by the title lender;

(7) Enter into a title loan agreement unless the debtor presents a clear title to titled personal property at the time that the loan is made. If the title lender files a lien against such titled personal property without possession of a clear title to such property, the resulting lien shall be void;

(8) Capitalize or add any accrued interest or fee to the original principal of the title loan agreement during any renewal of the agreement;

(9) Require a debtor to provide any additional guaranty as a condition to entering into a title loan agreement;

(10) Use any device or agreement, including agreements with affiliated title lenders, with the intent to obtain greater charges than otherwise would be authorized by this part; or

(11) Violate the provisions of this part or any rule promulgated pursuant thereto.

History.

I.C., § 28-46-508, as added by 2006, ch. 323, § 1, p. 1023; am. 2013, ch. 54, § 7, p. 108.

STATUTORY NOTES

Amendments.

The 2013 amendment, by ch. 54, rewrote the introductory paragraph, which formerly read: "A title lender shall not."

28-46-509. Exemption. — The provisions of this part shall not apply to any person licensed or chartered under the laws of any state or of the United States as a bank, savings and loan association, credit union, insurance company, or industrial loan company. The terms "bank," "savings and loan association," "credit union," "insurance company" and "industrial loan company" shall include employees and agents of such organizations as well as wholly-owned subsidiaries of such organizations, provided that the subsidiary is regularly examined by the chartering state or federal agency for consumer compliance purposes.

History.

I.C., § 28-46-509, as added by 2006, ch. 323, § 1, p. 1023.

CHAPTERS 47, 48

[RESERVED]

CHAPTER 49

**RELATIONSHIP TO OTHER LAWS, EFFECTIVE DATE,
AND OVERRIDE OF FEDERAL PREEMPTION**

SECTION.

28-49-101. Relationship to other laws.

28-49-102 — 28-49-104. [Repealed.]

28-49-105. Override of federal preemption.

SECTION.

28-49-106. Specific repealer. [Repealed.]

28-49-107. Chapter 22, title 26, unaffected.

28-49-101. Relationship to other laws. — (1) All political subdivisions of this state shall be prohibited from enacting and enforcing ordinances, resolutions and regulations pertaining to the financial or lending activities of persons who:

(a) Are subject to the jurisdiction of the department of finance of the state of Idaho, including activities subject to this chapter;

(b) Are subject to the jurisdiction or regulatory supervision of the board of governors of the federal reserve system, the office of the comptroller of the currency, the office of thrift supervision, the national credit union administration, the federal deposit insurance corporation, the federal trade

commission or the United States department of housing and urban development; or

(c) Originate, purchase, sell, assign, securitize or service property interests or obligations created by financial transactions or loans made, executed or originated by persons referred to in subsection (1)(a) or (1)(b) of this section or assist or facilitate such transactions.

(2) The requirements of this section shall apply to all ordinances, resolutions and regulations pertaining to financial or lending activities, including any ordinances, resolutions or regulations disqualifying persons from doing business with a political subdivision based upon financial or lending activities or imposing reporting requirements or any other obligations upon persons regarding financial or lending activities.

History.

I.C., § 28-49-101, as added by 2002, ch. 301, § 8, p. 858.

STATUTORY NOTES

Cross References.

Department of finance, § 67-2701 et seq.

Prior Laws.

Former § 28-49-101, which comprised I.C., § 28-49-101, as added by 1983, ch. 119, § 3, p. 264, was repealed by S.L. 2002, ch. 301, § 7.

Federal References.

The board of governors of the federal reserve system, referred to in paragraph (1)(b), is created at 12 U.S.C.S. § 241.

The office of the comptroller of the currency, referred to in paragraph (1)(b), is established at 12 U.S.C.S. § 1.

The office of thrift supervision, referred to in paragraph (1)(b), was merged in the office

of the comptroller of the currency and ceased to exist on October 19, 2011, pursuant to 12 U.S.C.S. § 5412.

The national credit union administration, referred to in paragraph (1)(b), is established at 12 U.S.C.S. § 1752a.

The federal deposit insurance corporation, referred to in paragraph (1)(b), is established at 12 U.S.C.S. § 1811.

The federal trade commission, referred to in paragraph (1)(b), is established at 15 U.S.C.S. § 41.

The department of housing and urban development, referred to in paragraph (1)(b), is established at 5 U.S.C.S. § 101. See 12 U.S.C.S. § 1701 et seq.

28-49-102 — 28-49-104. Continuation of licensing — Continuation of notification — Grace period. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised I.C., § 28-49-102, § 28-49-103 and § 28-49-104 as

added by 1983, ch. 119, § 3 p. 264, were repealed by S.L. 2002, ch. 301, § 9.

28-49-105. Override of federal preemption. — The legislature of the state of Idaho hereby declares and states that it does not want any of the provisions of Title V, Part A — Mortgage Usury Laws, Mortgages, Section 501(a)(1) of the Depository Institutions Deregulation and Monetary Control Act of 1980 (Public Law 96-221; 94 Stat. 132), to apply with respect to loans, mortgages, credit sales, and advances made in this state, and that the provisions of Title V, Part A — Mortgage Usury Laws, Mortgages, Section 501(a)(1) of the Depository Institutions Deregulation and Monetary Control

Act of 1980 (Public Law 96-221; 94 Stat. 132), shall not apply with respect to loans, mortgages, credit sales, and advances made in this state.

History.

I.C., § 28-49-105, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

RESEARCH REFERENCES

A.L.R. — Preemption issues under depository institutions deregulation and monetary control act. 28 A.L.R. Fed. 2d 467.

28-49-106. Specific repealer. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which was compiled from I.C.,

§ 28-49-106, as added by 1983, ch. 119, § 3, p. 264, was repealed by S.L. 2002, ch. 301, § 9.

28-49-107. Chapter 22, title 26, unaffected. — No provision of this act shall be construed to amend or repeal any of the provisions of chapter 22, title 26, Idaho Code, as the same is now enacted or as it may be hereafter amended, reenacted or substituted.

History.

I.C., § 28-49-107, as added by 1983, ch. 119, § 3, p. 264.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1983, ch.

119, compiled as chs. 41 to 49 of this title and § 41-2005.

CHAPTER 50

UNIFORM ELECTRONIC TRANSACTIONS ACT

SECTION.

28-50-101. Short title.

28-50-102. Definitions.

28-50-103. Scope.

28-50-104. Prospective application.

28-50-105. Use of electronic records and electronic signatures — Variation by agreement.

28-50-106. Construction and application.

28-50-107. Legal recognition of electronic records, electronic signatures and electronic contracts —

SECTION.

Electronic transmittal in lieu of certified mail.

28-50-108. Provision of information in writing — Presentation of records.

28-50-109. Attribution and effect of electronic record and electronic signature.

28-50-110. Effect of change or error.

28-50-111. Notarization and acknowledgment.

28-50-112. Retention of electronic records — Originals.

| SECTION. | SECTION. |
|--|--|
| 28-50-113. Admissibility in evidence. | of written records by governmental agencies. |
| 28-50-114. Automated transaction. | |
| 28-50-115. Time and place of sending and receipt. | 28-50-118. Acceptance and distribution of electronic records by governmental agencies. |
| 28-50-116. Transferable record. | |
| 28-50-117. Creation and retention of electronic records and conversion | 28-50-119. Interoperability. |
| | 28-50-120. Severability clause. |

28-50-101. Short title. — This act may be cited as the “Uniform Electronic Transactions Act.”

History.
I.C., § 28-50-101, as added by 2000, ch. 286, § 1, p. 959.

STATUTORY NOTES

Compiler’s Notes. 286, which is compiled as §§ 28-50-101 to 28-50-120.
The term “this act” refers to S.L. 2000, ch.

- 28-50-102. Definitions.** — In this chapter:
- (1) “Agreement” means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.
 - (2) “Automated transaction” means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one (1) or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.
 - (3) “Computer program” means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.
 - (4) “Contract” means the total legal obligation resulting from the parties’ agreement as affected by this chapter and other applicable law.
 - (5) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.
 - (6) “Electronic agent” means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.
 - (7) “Electronic record” means a record created, generated, sent, communicated, received or stored by electronic means.
 - (8) “Electronic signature” means an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.
 - (9) “Governmental agency” means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality or other political subdivision of a state.
 - (10) “Information” means data, text, images, sounds, codes, computer

programs, software, databases or the like, but shall not include the electronic transfer of funds to or from the state.

(11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying or processing information.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(16) "Transaction" means an action or set of actions occurring between two (2) or more persons relating to the conduct of business, commercial or governmental affairs.

History.

I.C., § 28-50-102, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. "Agreement."

Whether the parties have reached an agreement is determined by their express language and all surrounding circumstances. The Restatement 2d Contracts § 3 provides that, "An agreement is a manifestation of mutual assent on the part of two or more persons." See also Restatement 2d Contracts, Section 2, Comment b. The Uniform Commercial Code specifically includes in the circumstances from which an agreement may be inferred "course of performance, course of dealing and usage of trade ..." as defined in the UCC. Although the definition of agreement in this Act does not make specific reference to usage of trade and other party conduct, this definition is not intended to affect the construction of the parties' agreement under the substantive law applicable to a particular transaction. Where that law takes account of usage and conduct in informing the terms of the parties' agreement, the usage or conduct

would be relevant as "other circumstances" included in the definition under this Act.

Where the law applicable to a given transaction provides that system rules and the like constitute part of the agreement of the parties, such rules will have the same effect in determining the parties' agreement under this Act. For example, UCC Article 4 (Section 4-103(b)) provides that Federal Reserve regulations and operating circulars and clearing-house rules have the effect of agreements. Such agreements by law properly would be included in the definition of agreement in this Act.

The parties' agreement is relevant in determining whether the provisions of this Act have been varied by agreement. In addition, the parties' agreement may establish the parameters of the parties' use of electronic records and signatures, security procedures and similar aspects of the transaction. See Model Trading Partner Agreement, 45 Business

Lawyer Supp. Issue (June 1990). See Section 5(b) and Comments thereto.

2. "Automated Transaction."

An automated transaction is a transaction performed or conducted by electronic means in which machines are used without human intervention to form contracts and perform obligations under existing contracts. Such broad coverage is necessary because of the diversity of transactions to which this Act may apply.

As with electronic agents, this definition addresses the circumstance where electronic records may result in action or performance by a party although no human review of the electronic records is anticipated. Section 14 provides specific rules to assure that where one or both parties do not review the electronic records, the resulting agreement will be effective.

The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if one orders books from Bookseller.com through Bookseller's website, the transaction would be an automated transaction because Bookseller took and confirmed the order via its machine. Similarly, if Automaker and supplier do business through Electronic Data Interchange, Automaker's computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to supplier's computer. If Supplier's computer confirms the order and processes the shipment because the order falls within pre-programmed parameters in Supplier's computer, this would be a fully automated transaction. If, instead, the Supplier relies on a human employee to review, accept, and process the Buyer's order, then only the Automaker's side of the transaction would be automated. In either case, the entire transaction falls within this definition.

3. "Computer program."

This definition refers to the functional and operating aspects of an electronic, digital system. It relates to operating instructions used in an electronic system such as an electronic agent. (See definition of "Electronic Agent.")

4. "Electronic."

The basic nature of most current technologies and the need for a recognized, single term warrants the use of "electronic" as the defined term. The definition is intended to assure that the Act will be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to fulfill the purpose of this Act to validate commercial transactions regardless of the medium used by the parties. Current legal requirements for "writings" can be satisfied by almost any tangible media, whether paper, other fibers, or even stone. The purpose and applicability of this Act covers intangible

media which are technologically capable of storing, transmitting and reproducing information in human perceivable form, but which lack the tangible aspect of paper, papyrus or stone.

While not all technologies listed are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically "electronic," i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This Act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.

5. "Electronic agent."

This definition establishes that an electronic agent is a machine. As the term "electronic agent" has come to be recognized, it is limited to a tool function. The effect on the party using the agent is addressed in the operative provisions of the Act (e.g., Section 14).

An electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. As a general rule, the employer of a tool is responsible for the results obtained by the use of that tool since the tool has no independent volition of its own. However, an electronic agent, by definition, is capable within the parameters of its programming, of initiating, responding or interacting with other parties or their electronic agents once it has been activated by a party, without further attention of that party.

While this Act proceeds on the paradigm that an electronic agent is capable of performing only within the technical strictures of its preset programming, it is conceivable that, within the useful life of this Act, electronic agents may be created with the ability to act autonomously, and not just automatically. That is, through developments in artificial intelligence, a computer may be able to "learn through experience, modify the instructions in their own programs, and even devise new instructions." Allen and Widdison, "Can Computers Make Contracts?" 9 *Harv. J.L. & Tech* 25 (Winter, 1996). If such developments occur, courts may construe the definition of electronic agent accordingly, in order to recognize such new capabilities.

The examples involving Bookseller.com and Automaker in the Comment to the definition of Automated Transaction are equally applicable here. Bookseller acts through an electronic agent in processing an order for books. Automaker and the supplier each act through electronic agents in facilitating and effectuating the just-in-time inventory process through EDI.

6. "Electronic record."

An electronic record is a subset of the broader defined term "record." It is any record created, used or stored in a medium other than paper (see definition of electronic). The defined term is also used in this Act as a limiting definition in those provisions in which it is used.

Information processing systems, computer equipment and programs, electronic data interchange, electronic mail, voice mail, facsimile, telex, telecopying, scanning, and similar technologies all qualify as electronic under this Act. Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act.

7. "Electronic signature."

The idea of a signature is broad and not specifically defined. Whether any particular record is "signed" is a question of fact. Proof of that fact must be made under other applicable law. This Act simply assures that the signature may be accomplished through electronic means. No specific technology need be used in order to create a valid signature. One's voice on an answering machine may suffice if the requisite intention is present. Similarly, including one's name as part of an electronic mail communication also may suffice, as may the firm name on a facsimile. It also may be shown that the requisite intent was not present and accordingly the symbol, sound or process did not amount to a signature. One may use a digital signature with the requisite intention, or one may use the private key solely as an access device with no intention to sign, or otherwise accomplish a legally binding act. In any case the critical element is the intention to execute or adopt the sound or symbol or process for the purpose of signing the related record.

The definition requires that the signer execute or adopt the sound, symbol, or process with the intent to sign the record. The act of applying a sound, symbol or process to an electronic record could have differing meanings and effects. The consequence of the act and the effect of the act as a signature are determined under other applicable law. However, the essential attribute of a signature involves applying a sound, symbol or process with an intent to do a legally significant act. It

is that intention that is understood in the law as a part of the word "sign", without the need for a definition.

This Act establishes, to the greatest extent possible, the equivalency of electronic signatures and manual signatures. Therefore the term "signature" has been used to connote and convey that equivalency. The purpose is to overcome unwarranted biases against electronic methods of signing and authenticating records. The term "authentication," used in other laws, often has a narrower meaning and purpose than an electronic signature as used in this Act. However, an authentication under any of those other laws constitutes an electronic signature under this Act.

The precise effect of an electronic signature will be determined based on the surrounding circumstances under Section 9(b).

This definition includes as an electronic signature the standard webpage click through process. For example, when a person orders goods or services through a vendor's website, the person will be required to provide information as part of a process which will result in receipt of the goods or services. When the customer ultimately gets to the last step and clicks "I agree," the person has adopted the process and has done so with the intent to associate the person with the record of that process. The actual effect of the electronic signature will be determined from all the surrounding circumstances, however, the person adopted a process which the circumstances indicate s/he intended to have the effect of getting the goods/services and being bound to pay for them. The adoption of the process carried the intent to do a legally significant act, the hallmark of a signature.

Another important aspect of this definition lies in the necessity that the electronic signature be linked or logically associated with the record. In the paper world, it is assumed that the symbol adopted by a party is attached to or located somewhere in the same paper that is intended to be authenticated, e.g., an allonge firmly attached to a promissory note, or the classic signature at the end of a long contract. These tangible manifestations do not exist in the electronic environment, and accordingly, this definition expressly provides that the symbol must in some way be linked to, or connected with, the electronic record being signed. This linkage is consistent with the regulations promulgated by the Food and Drug Administration. 21 CFR Part 11 (March 20, 1997).

A digital signature using public key encryption technology would qualify as an electronic signature, as would the mere inclusion of one's name as a part of an e-mail message - so long as in each case the signer executed or adopted the symbol with the intent to sign.

8. "Governmental agency."

This definition is important in the context of optional Sections 17-19.

9. "Information processing system."

This definition is consistent with the UNCITRAL Model Law on Electronic Commerce. The term includes computers and other information systems. It is principally used in Section 15 in connection with the sending and receiving of information. In that context, the key aspect is that the information enter a system from which a person can access it.

10. Record."

This is a standard definition designed to embrace all means of communicating or storing information except human memory. It includes any method for storing or communicating information, including "writings." A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means. Information that has not been retained other than through human memory does not qualify as a record. As in the case of the terms "writing" or "written," the term "record" does not establish the purposes, permitted uses or legal effect which a record may have under any particular provision of substantive law. ABA Report on Use of the Term "Record," October 1, 1996.

11. "Security procedure."

A security procedure may be applied to verify an electronic signature, verify the identity of the sender, or assure the informational integrity of an electronic record. The definition does not identify any particular technology. This permits the use of procedures which the parties select or which are established by law. It permits the greatest flexibility among the parties and allows for future technological development.

The definition in this Act is broad and is used to illustrate one way of establishing attribution or content integrity of an electronic record or signature. The use of a security procedure is not accorded operative legal effect, through the use of presumptions or otherwise, by this Act. In this Act, the use of security procedures is simply one method for proving the source or content of an electronic record or signature.

A security procedure may be technologically very sophisticated, such as an asymmetric cryptographic system. At the other extreme the security procedure may be as simple as a telephone call to confirm the identity of the sender through another channel of communication. It may include the use of a mother's maiden name or a personal identification number (PIN). Each of these examples is a method for confirming the identity of a person or accuracy of a message.

12. "Transaction."

The definition has been limited to actions between people taken in the context of business, commercial or governmental activities. The term includes all interactions between people for business, commercial, including specifically consumer, or governmental purposes. However, the term does not include unilateral or non-transactional actions. As such it provides a structural limitation on the scope of the Act as stated in the next section.

It is essential that the term commerce and business be understood and construed broadly to include commercial and business transactions involving individuals who may qualify as "consumers" under other applicable law. If Alice and Bob agree to the sale of Alice's car to Bob for \$2000 using an internet auction site, that transaction is fully covered by this Act. Even if Alice and Bob each qualify as typical "consumers" under other applicable law, their interaction is a transaction in commerce. Accordingly their actions would be related to commercial affairs, and fully qualify as a transaction governed by this Act.

Other transaction types include:

1. A single purchase by an individual from a retail merchant, which may be accomplished by an order from a printed catalog sent by facsimile, or by exchange of electronic mail.

2. Recurring orders on a weekly or monthly basis between large companies which have entered into a master trading partner agreement to govern the methods and manner of their transaction parameters.

3. A purchase by an individual from an online internet retail vendor. Such an arrangement may develop into an ongoing series of individual purchases, with security procedures and the like, as a part of doing ongoing business.

4. The closing of a business purchase transaction via facsimile transmission of documents or even electronic mail. In such a transaction, all parties may participate through electronic conferencing technologies. At the appointed time all electronic records are executed electronically and transmitted to the other party. In such a case, the electronic records and electronic signatures are validated under this Act, obviating the need for "in person" closings.

A transaction must include interaction between two or more persons. Consequently, to the extent that the execution of a will, trust, or a health care power of attorney or similar health care designation does not involve another person and is a unilateral act, it would not be covered by this Act because not occurring as a part of a transaction as defined in this Act. However, this Act *does* apply to all electronic records and signatures *related* to a transaction, and so does cover, for example, internal auditing and accounting records related to a transaction.

28-50-103. Scope. — (a) Except as otherwise provided in subsection (b) of this section, this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by:

(1) A law governing the creation and execution of wills, codicils or testamentary trusts; and

(2) The uniform commercial code, other than section 28-1-306, Idaho Code, chapter 2, title 28, Idaho Code (uniform commercial code — sales), and chapter 12, title 28, Idaho Code (uniform commercial code — leases).

(c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under subsection (b) of this section to the extent it is governed by a law other than those specified in subsection (b) of this section.

(d) A transaction subject to this chapter is also subject to other applicable substantive law.

History.

I.C., § 28-50-103, as added by 2000, ch. 286, § 1, p. 959; am. 2004, ch. 43, § 43, p. 136.

STATUTORY NOTES

Compiler's Notes.

The words in parentheses so appeared in the law as enacted.

COMMENT TO OFFICIAL TEXT

1. The scope of this Act is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commercial or governmental transactions would not be subject to this Act. Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by this Act. See Section 2, Comment 12.

2. This Act affects the medium in which information, records and signatures may be presented and retained under current legal requirements. While this Act covers all electronic records and signatures which are used in a business, commercial (including consumer) or governmental transaction, the operative provisions of the Act relate to requirements for writings and signatures under other laws. Accordingly, the exclusions in subsection (b) focus on those legal rules imposing certain writing and signature requirements which will *not* be affected by this Act.

3. The exclusions listed in subsection (b) provide clarity and certainty regarding the laws which are and are not affected by this Act. This section provides that transactions subject to specific laws are unaffected by this Act and leaves the balance subject to this Act.

4. Paragraph (1) excludes wills, codicils and testamentary trusts. This exclusion is largely salutary given the unilateral context in which such records are generally created and the unlikely use of such records in a transaction as defined in this Act (i.e., actions taken by two or more persons in the context of business, commercial or governmental affairs). Paragraph (2) excludes all of the Uniform Commercial Code other than UCC Sections 1-107 and 1-206, and Articles 2 and 2A. This Act does not apply to the excluded UCC articles, whether in "current" or "revised" form. The Act does apply to UCC Articles 2 and 2A and to UCC Sections 1-107 and 1-206.

5. Articles 3, 4 and 4A of the UCC impact payment systems and have specifically been removed from the coverage of this Act. The check collection and electronic fund transfer systems governed by Articles 3, 4 and 4A involve systems and relationships involving numerous parties beyond the parties to the underlying contract. The impact of validating electronic media in such systems involves considerations beyond the scope of this Act. Articles 5, 8 and 9 have been excluded because the revision process relating to those Articles included significant consideration of electronic practices. Paragraph 4 provides for

exclusion from this Act of the Uniform Computer Information Transactions Act (UCITA) because the drafting process of that Act also included significant consideration of electronic contracting provisions.

6. The very limited application of this Act to Transferable Records in Section 16 does not affect payment systems, and the section is designed to apply to a transaction only through express agreement of the parties. The exclusion of Articles 3 and 4 will not affect the Act's coverage of Transferable Records. Section 16 is designed to allow for the development of systems which will provide "control" as defined in Section 16. Such control is necessary as a substitute for the idea of possession which undergirds negotiable instrument law. The technology has yet to be developed which will allow for the possession of a unique electronic token embodying the rights associated with a negotiable promissory note. Section 16's concept of control is intended as a substitute for possession.

The provisions in Section 16 operate as free standing rules, establishing the rights of parties using Transferable Records *under this Act*. The references in Section 16 to UCC Sections 3-302, 7-501, and 9-308 (R9-330(d)) are designed to incorporate the substance of those provisions into this Act for the limited purposes noted in Section 16(c). Accordingly, an electronic record which is also a Transferable Record, would not be used for purposes of a transaction governed by Articles 3, 4, or 9, but would be an electronic record used for purposes of a transaction governed by Section 16. However, it is important to remember that those UCC Articles will still apply to the transferable record in their own right. Accordingly any other substantive requirements, e.g., method and manner of perfection under Article 9, must be complied with under those other laws. See Comments to Section 16.

7. This Act does apply, *in toto*, to transactions under unrevised Articles 2 and 2A. There is every reason to validate electronic contracting in these situations. Sale and lease transactions do not implicate broad systems beyond the parties to the underlying transaction, such as are present in check collection and electronic funds transfers. Further sales and leases generally do not have as far reaching effect on the rights of third parties beyond the contracting parties, such as exists in the secured transactions system. Finally, it is in the area of sales, licenses and leases that electronic commerce is occurring to its greatest extent today. To exclude these transactions would largely gut the purpose of this Act.

In the event that Articles 2 and 2A are revised and adopted in the future, UETA will only apply to the extent provided in those Acts.

8. An electronic record/signature may be used for purposes of more than one legal requirement, or may be covered by more than one law. Consequently, it is important to make clear, despite any apparent redundancy, in subsection (c) that an electronic record used for purposes of a law which is *not* affected by this Act under subsection (b) may nonetheless be used and validated for purposes of other laws not excluded by subsection (b). For example, this Act does not apply to an electronic record of a check when used for purposes of a transaction governed by Article 4 of the Uniform Commercial Code, i.e., the Act does not validate so-called electronic checks. However, for purposes of check retention statutes, the same electronic record of the check is covered by this Act, so that retention of an electronic image/record of a check will satisfy such retention statutes, so long as the requirements of Section 12 are fulfilled.

In another context, subsection (c) would operate to allow this Act to apply to what would appear to be an excluded transaction under subsection (b). For example, Article 9 of the Uniform Commercial Code applies generally to any transaction that creates a security interest in personal property. However, Article 9 excludes landlord's liens. Accordingly, although this Act excludes from its application transactions subject to Article 9, this Act would apply to the creation of a landlord lien if the law otherwise applicable to landlord's liens did not provide otherwise, because the landlord's lien transaction is excluded from Article 9.

9. Additional exclusions under subparagraph (b)(4) should be limited to laws which govern electronic records and signatures which may be used in transactions as defined in Section 2(16). Records used unilaterally, or which do not relate to business, commercial (including consumer), or governmental affairs are not governed by this Act in any event, and exclusion of laws relating to such records may create unintended inferences about whether other records and signatures are covered by this Act.

It is also important that additional exclusions, if any, be incorporated under subsection (b)(4). As noted in Comment 8 above, an electronic record used in a transaction excluded under subsection (b), e.g., a check used to pay one's taxes, will nonetheless be validated for purposes of other, non-excluded laws under subsection (c), e.g., the check when used as proof of payment. It is critical that additional exclusions, if any, be incorporated into subsection (b) so that the salutary effect of subsection (c) apply to validate those records in other, non-excluded transactions. While a legislature may determine that a particular notice, such as a utility shutoff notice, be provided to a person in writing on

paper, it is difficult to see why the utility should not be entitled to use electronic media for storage and evidentiary purposes.

The following discussion is derived from the Report dated September 21, 1998 of The Task Force on State Law Exclusions (the "Task Force") presented to the Drafting Committee. After consideration of the Report, the Drafting Committee determined that exclusions other than those specified in the Act were not warranted. In addition, other inherent limitations on the applicability of the Act (the definition of transaction, the requirement that the parties acquiesce in the use of an electronic format) also militate against additional exclusions. Nonetheless, the Drafting Committee recognized that some legislatures may wish to exclude additional transactions from the Act, and determined that guidance in some major areas would be helpful to those legislatures considering additional areas for exclusion.

Because of the overwhelming number of references in state law to writings and signatures, the following list of possible transactions is not exhaustive. However, they do represent those areas most commonly raised during the course of the drafting process as areas that might be inappropriate for an electronic medium. It is important to keep in mind however, that the Drafting Committee determined that exclusion of these additional areas was not warranted.

1. Trusts (other than testamentary trusts). Trusts can be used for both business and personal purposes. By virtue of the definition of transaction, trusts used outside the area of business and commerce would not be governed by this Act. With respect to business or commercial trusts, the laws governing their formation contain few or no requirements for paper or signatures. Indeed, in most jurisdictions trusts of any kind may be created orally. Consequently, the Drafting Committee believed that the Act should apply to any transaction where the law leaves to the parties the decision of whether to use a writing. Thus, in the absence of legal requirements for writings, there is no sound reason to exclude laws governing trusts from the application of this Act.

2. Powers of Attorney. A power of attorney is simply a formalized type of agency agreement. In general, no formal requirements for paper or execution were found to be applicable to the validity of powers of attorney.

Special health powers of attorney have been established by statute in some States. These powers may have special requirements under state law regarding execution, acknowledgment and possibly notarization. In the normal case such powers will not arise in a transactional context and so would not be

covered by this Act. However, even if such a record were to arise in a transactional context, this Act operates simply to remove the barrier to the use of an electronic medium, and preserves other requirements of applicable substantive law, avoiding any necessity to exclude such laws from the operation of this Act. Especially in light of the provisions of Sections 8 and 11, the substantive requirements under such laws will be preserved and may be satisfied in an electronic format.

3. Real Estate Transactions. It is important to distinguish between the efficacy of paper documents involving real estate between the parties, as opposed to their effect on third parties. As between the parties it is unnecessary to maintain existing barriers to electronic contracting. There are no unique characteristics to contracts relating to real property as opposed to other business and commercial (including consumer) contracts. Consequently, the decision whether to use an electronic medium for their agreements should be a matter for the parties to determine. Of course, to be effective against third parties state law generally requires filing with a governmental office. Pending adoption of electronic filing systems by States, the need for a piece of paper to file to perfect rights against third parties, will be a consideration for the parties. In the event notarization and acknowledgment are required under other laws, Section 11 provides a means for such actions to be accomplished electronically.

With respect to the requirements of government filing, those are left to the individual States in the decision of whether to adopt and implement electronic filing systems. (See optional Sections 17-19.) However, government recording systems currently require paper deeds including notarized, manual signatures. Although California and Illinois are experimenting with electronic filing systems, until such systems become widespread, the parties likely will choose to use, at the least, a paper deed for filing purposes. Nothing in this Act precludes the parties from selecting the medium best suited to the needs of the particular transaction. Parties may wish to consummate the transaction using electronic media in order to avoid expensive travel. Yet the actual deed may be in paper form to assure compliance with existing recording systems and requirements. The critical point is that nothing in this Act prevents the parties from selecting paper or electronic media for all or part of their transaction.

4. Consumer Protection Statutes. Consumer protection provisions in state law often require that information be disclosed or provided to a consumer in writing. Because this Act does apply to such transactions, the question of whether such laws should be specifically excluded was considered. Exclusion of

consumer transactions would eliminate a huge group of commercial transactions which benefit consumers by enabling the efficiency of the electronic medium. Commerce over the internet is driven by consumer demands and concerns and must be included.

At the same time, it is important to recognize the protective effects of many consumer statutes. Consumer statutes often require that information be provided in writing, or may require that the consumer separately sign or initial a particular provision to evidence that the consumer's attention was brought to the provision. Subsection (1) requires electronic records to be retainable by a person whenever the law requires information to be delivered in writing. The section imposes a significant burden on the sender of information. The sender must assure that the information system of the recipient is compatible with, and capable of retaining the information sent by, the sender's system. Furthermore, nothing in this Act permits the avoidance of legal requirements of separate signatures or initialing. The Act simply permits the signature or initialing to be done electronically.

Other consumer protection statutes require (expressly or implicitly) that certain information be presented in a certain manner or format. Laws requiring information to be presented in particular fonts, formats or in similar fashion, as well as laws requiring conspicuous displays of information are preserved. Section 8(b)(3) specifically preserves the applicability of such requirements in an electronic environment. In the case of legal requirements that information be presented or appear conspicuous, the determination of what is conspicuous will be left to other law. Section 8 was included to specifically preserve the protective functions of such disclosure statutes, while at the same time allowing the use of electronic media if the substantive requirements of the other laws could be satisfied in the electronic medium.

Formatting and separate signing requirements serve a critical purpose in much consumer protection legislation, to assure that information is not slipped past the unsuspecting consumer. Not only does this Act not disturb those requirements, it preserves those requirements. In addition, other bodies of substantive law continue to operate to allow the courts to police any such bad conduct or overreaching, e.g., unconscionability, fraud, duress, mistake and the like. These bodies of law remain applicable regardless of the medium in which a record appears.

The requirement that both parties agree to conduct a transaction electronically also prevents the imposition of an electronic medium on unwilling parties. See Section 5(b). In addition, where the law requires inclusion of specific terms or language, those requirements are preserved broadly by Section 5(e).

Requirements that information be sent to, or received by, someone have been preserved in Section 15. As in the paper world, obligations to send do not impose any duties on the sender to assure receipt, other than reasonable methods of dispatch. In those cases where receipt is required legally, Sections 5, 8, and 15 impose the burden on the sender to assure delivery to the recipient if satisfaction of the legal requirement is to be fulfilled.

The preservation of existing safeguards, together with the ability to opt out of the electronic medium entirely, demonstrate the lack of any need generally to exclude consumer protection laws from the operation of this Act. Legislatures may wish to focus any review on those statutes which provide for post-contract formation and post-breach notices to be in paper. However, any such consideration must also balance the needed protections against the potential burdens which may be imposed. Consumers and others will not be well served by restrictions which preclude the employment of electronic technologies sought and desired by consumers.

28-50-104. Prospective application. — This chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after the initial effective date of this chapter.

History.

I.C., § 28-50-104, as added by 2000, ch. 286, § 1, p. 959.

STATUTORY NOTES

Effective Dates.

The "effective date of this chapter" is the

effective date of S.L. 2000, ch. 286, July 1, 2000.

COMMENT TO OFFICIAL TEXT

This section makes clear that the Act only applies to validate electronic records and signatures which arise subsequent to the effective date of the Act. Whether electronic re-

cords and electronic signatures arising before the effective date of this Act are valid is left to other law.

28-50-105. Use of electronic records and electronic signatures — Variation by agreement. — (a) This chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

History.

I.C., § 28-50-105, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

This section limits the applicability of this Act to transactions which parties have agreed to conduct electronically. Broad interpretation of the term agreement is necessary to assure that this Act has the widest possible application consistent with its purpose of removing barriers to electronic commerce.

1. This section makes clear that this Act is intended to facilitate the use of electronic means, but does not require the use of electronic records and signatures. This fundamental principle is set forth in subsection (a) and elaborated by subsections (b) and (c), which require an intention to conduct transactions electronically and preserve the right of a party to refuse to use electronics in any subsequent transaction.

2. The paradigm of this Act is two willing parties doing transactions electronically. It is therefore appropriate that the Act is voluntary and preserves the greatest possible party autonomy to refuse electronic transactions. The requirement that party agreement be

found from all the surrounding circumstances is a limitation on the scope of this Act.

3. If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such an explicit contract should not be necessary before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, the requisite agreement, express or implied, must be determined from all available circumstances and evidence.

4. Subsection (b) provides that the Act applies to transactions in which the parties have agreed to conduct the transaction electronically. In this context it is essential that the parties' actions and words be broadly construed in determining whether the requisite

agreement exists. Accordingly, the Act expressly provides that the party's agreement is to be found from all circumstances, including the parties' conduct. The critical element is the intent of a party to conduct a transaction electronically. Once that intent is established, this Act applies. See Restatement 2d Contracts, Sections 2, 3, and 19.

Examples of circumstances from which it may be found that parties have reached an agreement to conduct transactions electronically include the following:

A. Automaker and supplier enter into a Trading Partner Agreement setting forth the terms, conditions and methods for the conduct of business between them electronically.

B. Joe gives out his business card with his business e-mail address. It may be reasonable, under the circumstances, for a recipient of the card to infer that Joe has agreed to communicate electronically for business purposes. However, in the absence of additional facts, it would not necessarily be reasonable to infer Joe's agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.

C. Sally may have several e-mail addresses — home, main office, office of a non-profit organization on whose board Sally sits. In each case, it may be reasonable to infer that Sally is willing to communicate electronically with respect to business related to the business/purpose associated with the respective e-mail addresses. However, depending on the circumstances, it may not be reasonable to communicate with Sally for purposes other than those related to the purpose for which she maintained a particular e-mail account.

D. Among the circumstances to be considered in finding an agreement would be the time when the assent occurred relative to the timing of the use of electronic communications. If one orders books from an online vendor, such as Bookseller.com, the intention to conduct that transaction and to receive any correspondence related to the transaction electronically can be inferred from the conduct. Accordingly, as to information related to that transaction it is reasonable for Bookseller to deal with the individual electronically.

The examples noted above are intended to focus the inquiry on the party's agreement to conduct a transaction electronically. Similarly, if two people are at a meeting and one tells the other to send an e-mail to confirm a transaction - the requisite agreement under subsection (b) would exist. In each case, the use of a business card, statement at a meeting, or other evidence of willingness to conduct a transaction electronically must be

viewed in light of all the surrounding circumstances with a view toward broad validation of electronic transactions.

5. Just as circumstances may indicate the existence of agreement, express or implied from surrounding circumstances, circumstances may also demonstrate the absence of true agreement. For example:

A. If Automaker, Inc. were to issue a recall of automobiles via its Internet website, it would not be able to rely on this Act to validate that notice in the case of a person who never logged on to the website, or indeed, had no ability to do so, notwithstanding a clause in a paper purchase contract by which the buyer agreed to receive such notices in such a manner.

B. Buyer executes a standard form contract in which an agreement to receive all notices electronically is set forth on page 3 in the midst of other fine print. Buyer has never communicated with Seller electronically, and has not provided any other information in the contract to suggest a willingness to deal electronically. Not only is it unlikely that any but the most formalistic of agreements may be found, but nothing in this Act prevents courts from policing such form contracts under common law doctrines relating to contract formation, unconscionability and the like.

6. Subsection (c) has been added to make clear the ability of a party to refuse to conduct a transaction electronically, even if the person has conducted transactions electronically in the past. The effectiveness of a party's refusal to conduct a transaction electronically will be determined under other applicable law in light of all surrounding circumstances. Such circumstances must include an assessment of the transaction involved.

A party's right to decline to act electronically under a specific contract, on the ground that each action under that contract amounts to a separate "transaction," must be considered in light of the purpose of the contract and the action to be taken electronically. For example, under a contract for the purchase of goods, the giving and receipt of notices electronically, as provided in the contract, should not be viewed as discreet transactions. Rather such notices amount to separate actions which are part of the "transaction" of purchase evidenced by the contract. Allowing one party to require a change of medium in the middle of the transaction evidenced by that contract is not the purpose of this subsection. Rather this subsection is intended to preserve the party's right to conduct the next purchase in a nonelectronic medium.

7. Subsection (e) is an essential provision in the overall scheme of this Act. While this Act validates and effectuates electronic records and electronic signatures, the legal effect of

such records and signatures is left to existing substantive law outside this Act except in very narrow circumstances. See, e.g., Section 16. Even when this Act operates to validate records and signatures in an electronic medium, it expressly preserves the substantive rules of other law applicable to such records. See, e.g., Section 11.

For example, beyond validation of records, signatures and contracts based on the medium used, Section 7 (a) and (b) should not be interpreted as establishing the legal effectiveness of any given record, signature or con-

tract. Where a rule of law requires that the record contain minimum substantive content, the legal effect of such a record will depend on whether the record meets the substantive requirements of other applicable law.

Section 8 expressly preserves a number of legal requirements in currently existing law relating to the presentation of information in writing. Although this Act now would allow such information to be presented in an electronic record, Section 8 provides that the other substantive requirements of law must be satisfied in the electronic medium as well.

28-50-106. Construction and application. — This chapter must be construed and applied:

- (1) To facilitate electronic transactions consistent with other applicable law;
- (2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and
- (3) To effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

History.

I.C., § 28-50-106, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. The purposes and policies of this Act are
(a) to facilitate and promote commerce and governmental transactions by validating and authorizing the use of electronic records and electronic signatures;

(b) to eliminate barriers to electronic commerce and governmental transactions resulting from uncertainties relating to writing and signature requirements;

(c) to simplify, clarify and modernize the law governing commerce and governmental transactions through the use of electronic means;

(d) to permit the continued expansion of commercial and governmental electronic practices through custom, usage and agreement of the parties;

(e) to promote uniformity of the law among the States (and worldwide) relating to the use of electronic and similar technological means of effecting and performing commercial and governmental transactions;

(f) to promote public confidence in the va-

lidity, integrity and reliability of electronic commerce and governmental transactions; and

(g) to promote the development of the legal and business infrastructure necessary to implement electronic commerce and governmental transactions.

2. This Act has been drafted to permit flexible application consistent with its purpose to validate electronic transactions. The provisions of this Act validating and effectuating the employ of electronic media allow the courts to apply them to new and unforeseen technologies and practices. As time progresses, it is anticipated that what is new and unforeseen today will be commonplace tomorrow. Accordingly, this legislation is intended to set a framework for the validation of media which may be developed in the future and which demonstrate the same qualities as the electronic media contemplated and validated under this Act.

28-50-107. Legal recognition of electronic records, electronic signatures and electronic contracts — Electronic transmittal in lieu of certified mail. — (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

(e) If a law requires any notice or other record to be sent by certified mail, the record may, with the express consent of the recipient, be transmitted electronically.

History.

I.C., § 28-50-107, as added by 2000, ch.

286, § 1, p. 959; am. 2003, ch. 155, § 1, p. 441.

COMMENT TO OFFICIAL TEXT

1. This section sets forth the fundamental premise of this Act: namely, that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance. Subsections (a) and (b) are designed to eliminate the single element of medium as a reason to deny effect or enforceability to a record, signature, or contract. The fact that the information is set forth in an electronic, as opposed to paper, record is irrelevant.

2. Under Restatement 2d Contracts Section 8, a contract may have legal effect and yet be unenforceable. Indeed, one circumstance where a record or contract may have effect but be unenforceable is in the context of the Statute of Frauds. Though a contract may be unenforceable, the records may have collateral effects, as in the case of a buyer that insures goods purchased under a contract unenforceable under the Statute of Frauds. The insurance company may not deny a claim on the ground that the buyer is not the owner, though the buyer may have no direct remedy against seller for failure to deliver. See Restatement 2d Contracts, Section 8, Illustration 4.

While this section would validate an electronic record for purposes of a statute of frauds, if an agreement to conduct the transaction electronically cannot reasonably be found (See Section 5(b)) then a necessary predicate to the applicability of this Act would be absent and this Act would not validate the electronic record. Whether the electronic record might be valid under other law is not addressed by this Act.

3. Subsections (c) and (d) provide the positive assertion that electronic records and signatures satisfy legal requirements for writings and signatures. The provisions are limited to requirements in laws that a record be in writing or be signed. This section does not address requirements imposed by other law in addition to requirements for writings and signatures See, e.g., Section 8.

Subsections (c) and (d) are particularized applications of subsection (a). The purpose is to validate and effectuate electronic records and signatures as the equivalent of writings, subject to all of the rules applicable to the efficacy of a writing, except as such other rules are modified by the more specific provisions of this Act.

Illustration 1: A sends the following e-mail to B: "I hereby offer to buy widgets from you, delivery next Tuesday. /s/ A." B responds with the following e-mail: "I accept your offer to buy widgets for delivery next Tuesday. /s/ B." The e-mails may not be denied effect solely because they are electronic. In addition, the e-mails do qualify as records under the Statute of Frauds. However, because there is no quantity stated in either record, the parties' agreement would be unenforceable under existing UCC Section 2-201(1).

Illustration 2: A sends the following e-mail to B: "I hereby offer to buy 100 widgets for \$1000, delivery next Tuesday. /s/ A." B responds with the following e-mail: "I accept your offer to purchase 100 widgets for \$1000, delivery next Tuesday. /s/ B." In this case the analysis is the same as in Illustration 1 except that here the records otherwise satisfy the requirements of UCC Section 2-201(1). The transaction may not be denied legal effect solely because there is not a pen and ink "writing" or "signature".

4. Section 8 addresses additional requirements imposed by other law which may affect the legal effect or enforceability of an electronic record in a particular case. For example, in Section 8(a) the legal requirement addressed is *the provision of information* in writing. The section then sets forth the standards to be applied in determining whether the provision of information by an electronic record is the equivalent of the provision of information in writing. The requirements in Section 8 are in addition to the bare validation that occurs under this section.

5. Under the substantive law applicable to a particular transaction within this Act, the legal effect of an electronic record may be separate from the issue of whether the record contains a signature. For example, where notice must be given as part of a contractual obligation, the effectiveness of the notice will

turn on whether the party provided the notice regardless of whether the notice was signed (See Section 15). An electronic record attributed to a party under Section 9 and complying with the requirements of Section 15 would suffice in that case, notwithstanding that it may not contain an electronic signature.

28-50-108. Provision of information in writing — Presentation of records. — (a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record: (i) to be posted or displayed in a certain manner; (ii) to be sent, communicated, or transmitted by a specified method; or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in subsection (d)(2) of this section, the record must be sent, communicated or transmitted by the method specified in the other law.

(3) The record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) To the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subsection (a) of this section that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) A requirement under a law other than this chapter to send, communicate or transmit a record by regular United States mail, may be varied by agreement to the extent permitted by the other law.

History.

I.C., § 28-50-108, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. This section is a savings provision, designed to assure, consistent with the fundamental purpose of this Act, that otherwise applicable substantive law will not be overrid-

den by this Act. The section makes clear that while the pen and ink provisions of such other law may be satisfied electronically, nothing in this Act vitiates the other requirements of

such laws. The section addresses a number of issues related to disclosures and notice provisions in other laws.

2. This section is independent of the prior section. Section 7 refers to legal requirements for a writing. This section refers to legal requirements for the provision of information in writing or relating to the method or manner of presentation or delivery of information. The section addresses more specific legal requirements of other laws, provides standards for satisfying the more particular legal requirements, and defers to other law for satisfaction of requirements under those laws.

3. Under subsection (a), to meet a requirement of other law that information be provided in writing, the recipient of an electronic record of the information must be able to get to the electronic record and read it, and must have the ability to get back to the information in some way at a later date. Accordingly, the section requires that the electronic record be capable of retention for later review.

The section specifically provides that any inhibition on retention imposed by the sender or the sender's system will preclude satisfaction of this section. Use of technological means now existing or later developed which prevents the recipient from retaining a copy the information would result in a determination that information has not been provided under subsection (a). The policies underlying laws requiring the provision of information in writing warrant the imposition of an additional burden on the sender to make the information available in a manner which will permit subsequent reference. A difficulty does exist for senders of information because of the disparate systems of their recipients and the capabilities of those systems. However, in order to satisfy the *legal requirement* of other law to make information available, the sender must assure that the recipient receives and can retain the information. However, it is left for the courts to determine whether the sender has complied with this subsection if evidence demonstrates that it is something peculiar the recipient's system which precludes subsequent reference to the information.

4. Subsection (b) is a savings provision for laws which provide for the means of delivering or displaying information and which are

not affected by the Act. For example, if a law requires delivery of notice by first class US mail, that means of delivery would not be affected by this Act. The information to be delivered may be provided on a disc, i.e., in electronic form, but the particular means of delivery must still be via the US postal service. Display, delivery and formatting requirements will continue to be applicable to electronic records and signatures. If those legal requirements can be satisfied in an electronic medium, e.g., the information can be presented in the equivalent of 20 point bold type as required by other law, this Act will validate the use of the medium, leaving to the other applicable law the question of whether the particular electronic record meets the other legal requirements. If a law requires that particular records be delivered together, or attached to other records, this Act does not preclude the delivery of the records together in an electronic communication, so long as the records are connected or associated with each other in a way determined to satisfy the other law.

5. Subsection (c) provides incentives for senders of information to use systems which will not inhibit the other party from retaining the information. However, there are circumstances where a party providing certain information may wish to inhibit retention in order to protect intellectual property rights or prevent the other party from retaining confidential information about the sender. In such cases inhibition is understandable, but if the sender wishes to enforce the record in which the information is contained, the sender may not inhibit its retention by the recipient. Unlike subsection (a), subsection (c) applies in all transactions and simply provides for unenforceability against the recipient. Subsection (a) applies only where another law imposes the writing requirement, and subsection (a) imposes a broader responsibility on the sender to assure retention capability by the recipient.

6. The protective purposes of this section justify the non-waivability provided by subsection (d). However, since the requirements for sending and formatting and the like are imposed by other law, to the extent other law permits waiver of such protections, there is no justification for imposing a more severe burden in an electronic environment.

28-50-109. Attribution and effect of electronic record and electronic signature. — (a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to

a person under subsection (a) of this section is determined from the context and surrounding circumstances at the time of its creation, execution or adoption, including the parties' agreement, if any, and otherwise as provided by law.

History.

I.C., § 28-50-109, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. Under subsection (a), so long as the electronic record or electronic signature resulted from a person's action it will be attributed to that person — the legal effect of that attribution is addressed in subsection (b). This section does not alter existing rules of law regarding attribution. The section assures that such rules will be applied in the electronic environment. A person's actions include actions taken by human agents of the person, as well as actions taken by an electronic agent, i.e., the tool, of the person. Although the rule may appear to state the obvious, it assures that the record or signature is not ascribed to a machine, as opposed to the person operating or programming the machine.

In each of the following cases, both the electronic record and electronic signature would be attributable to a person under subsection (a):

A. The person types his/her name as part of an e-mail purchase order;

B. The person's employee, pursuant to authority, types the person's name as part of an e-mail purchase order;

C. The person's computer, programmed to order goods upon receipt of inventory information within particular parameters, issues a purchase order which includes the person's name, or other identifying information, as part of the order.

In each of the above cases, law other than this Act would ascribe both the signature and the action to the person if done in a paper medium. Subsection (a) expressly provides that the same result will occur when an electronic medium is used.

2. Nothing in this section affects the use of a signature as a device for attributing a record to a person. Indeed, a signature is often the primary method for attributing a record to a person. In the foregoing examples, once the electronic signature is attributed to the person, the electronic record would also be attributed to the person, unless the person established fraud, forgery, or other invalidating cause. However, a signature is not the only method for attribution.

3. The use of facsimile transmissions provides a number of examples of attribution

using information other than a signature. A facsimile may be attributed to a person because of the information printed across the top of the page that indicates the machine from which it was sent. Similarly, the transmission may contain a letterhead which identifies the sender. Some cases have held that the letterhead actually constituted a signature because it was a symbol adopted by the sender with intent to authenticate the facsimile. However, the signature determination resulted from the necessary finding of intention in that case. Other cases have found facsimile letterheads NOT to be signatures because the requisite intention was not present. The critical point is that with or without a signature, information within the electronic record may well suffice to provide the facts resulting in attribution of an electronic record to a particular party.

In the context of attribution of records, normally the content of the record will provide the necessary information for a finding of attribution. It is also possible that an established course of dealing between parties may result in a finding of attribution. Just as with a paper record, evidence of forgery or counterfeiting may be introduced to rebut the evidence of attribution.

4. Certain information may be present in an electronic environment that does not appear to attribute but which clearly links a person to a particular record. Numerical codes, personal identification numbers, public and private key combinations all serve to establish the party to whom an electronic record should be attributed. Of course security procedures will be another piece of evidence available to establish attribution.

The inclusion of a specific reference to security procedures as a means of proving attribution is salutary because of the unique importance of security procedures in the electronic environment. In certain processes, a technical and technological security procedure may be the best way to convince a trier of fact that a particular electronic record or signature was that of a particular person. In certain circumstances, the use of a security procedure to establish that the record and related signature came from the person's

business might be necessary to overcome a claim that a hacker intervened. The reference to security procedures is not intended to suggest that other forms of proof of attribution should be accorded less persuasive effect. It is also important to recall that the particular strength of a given procedure does not affect the procedure's status as a security procedure, but only affects the weight to be accorded the evidence of the security procedure as tending to establish attribution.

5. This section does apply in determining the effect of a "click-through" transaction. A "click-through" transaction involves a process which, if executed with an intent to "sign," will be an electronic signature. See definition of Electronic Signature. In the context of an anonymous "click-through," issues of proof

will be paramount. This section will be relevant to establish that the resulting electronic record is attributable to a particular person upon the requisite proof, including security procedures which may track the source of the click-through.

6. Once it is established that a record or signature is attributable to a particular party, the effect of a record or signature must be determined in light of the context and surrounding circumstances, including the parties' agreement, if any. Also informing the effect of any attribution will be other legal requirements considered in light of the context. Subsection (b) addresses the effect of the record or signature once attributed to a person.

28-50-110. Effect of change or error. — If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one (1) party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(A) Promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(B) Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(C) Has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither subsection (1) nor (2) of this section apply, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Subsections (2) and (3) of this section may not be varied by agreement.

History.

I.C., § 28-50-110, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. This section is limited to changes and errors occurring in transmissions between parties — whether person-person (paragraph

1) or in an automated transaction involving an individual and a machine (paragraphs 1 and 2). The section focuses on the effect of

changes and errors occurring when records are exchanged between parties. In cases where changes and errors occur in contexts other than transmission, the law of mistake is expressly made applicable to resolve the conflict.

The section covers both changes and errors. For example, if Buyer sends a message to Seller ordering 100 widgets, but Buyer's information processing system changes the order to 1000 widgets, a "change" has occurred between what Buyer transmitted and what Seller received. If on the other hand, Buyer typed in 1000 intending to order only 100, but sent the message before noting the mistake, an error would have occurred which would also be covered by this section.

2. Paragraph (1) deals with any transmission where the parties have agreed to use a security procedure to detect changes and errors. It operates against the nonconforming party, i.e., the party in the best position to have avoided the change or error, regardless of whether that person is the sender or recipient. The source of the error/change is not indicated, and so both human and machine errors/change would be covered. With respect to errors or changes that would not be detected by the security procedure even if applied, the parties are left to the general law of mistake to resolve the dispute.

3. Paragraph (1) applies only in the situation where a security procedure would detect the error/change but one party fails to use the procedure and does not detect the error/change. In such a case, consistent with the law of mistake generally, the record is made avoidable at the instance of the party who took all available steps to avoid the mistake. See Restatement 2d Contracts Sections 152-154.

Making the erroneous record avoidable by the conforming party is consistent with Sections 153 and 154 of the Restatement 2d Contracts because the non-conforming party was in the best position to avoid the problem, and would bear the risk of mistake. Such a case would constitute mistake by one party. The mistaken party (the conforming party) would be entitled to avoid any resulting contract under Section 153 because s/he does not have the risk of mistake and the non-conforming party had reason to know of the mistake.

4. As with paragraph (1), paragraph (2), when applicable, allows the mistaken party to avoid the effect of the erroneous electronic record. However, the subsection is limited to human error on the part of an individual when dealing with the electronic agent of the other party. In a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the electronic agent of the other

party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous record.

Paragraph (2) applies only to errors made by individuals. If the error results from the electronic agent, it would constitute a system error. In such a case the effect of that error would be resolved under paragraph (1) if applicable, otherwise under paragraph (3) and the general law of mistake.

5. The party acting through the electronic agent/machine is given incentives by this section to build in safeguards which enable the individual to prevent the sending of an erroneous record, or correct the error once sent. For example, the electronic agent may be programed to provide a "confirmation screen" to the individual setting forth all the information the individual initially approved. This would provide the individual with the ability to prevent the erroneous record from ever being sent. Similarly, the electronic agent might receive the record sent by the individual and then send back a confirmation which the individual must again accept before the transaction is completed. This would allow for correction of an erroneous record. In either case, the electronic agent would "provide an opportunity for prevention or correction of the error," and the subsection would not apply. Rather, the effect of any error is governed by other law.

6. Paragraph (2) also places additional requirements on the mistaken individual before the paragraph may be invoked to avoid an erroneous electronic record. The individual must take prompt action to advise the other party of the error and the fact that the individual did not intend the electronic record. Whether the action is prompt must be determined from all the circumstances including the individual's ability to contact the other party. The individual should advise the other party both of the error and of the lack of intention to be bound (i.e., avoidance) by the electronic record received. Since this provision allows avoidance by the mistaken party, that party should also be required to expressly note that it is seeking to avoid the electronic record, i.e., lacked the intention to be bound.

Second, restitution is normally required in order to undo a mistaken transaction. Accordingly, the individual must also return or destroy any consideration received, adhering to instructions from the other party in any case. This is to assure that the other party retains control over the consideration sent in error.

Finally, and most importantly in regard to transactions involving intermediaries which may be harmed because transactions cannot be unwound, the individual cannot have received any benefit from the transaction. This

section prevents a party from unwinding a transaction after the delivery of value and consideration which cannot be returned or destroyed. For example, if the consideration received is information, it may not be possible to avoid the benefit conferred. While the information itself could be returned, mere access to the information, or the ability to redistribute the information would constitute a benefit precluding the mistaken party from unwinding the transaction. It may also occur that the mistaken party receives consideration which changes in value between the time of receipt and the first opportunity to return. In such a case restitution cannot be made adequately, and the transaction would not be avoidable. In each of the foregoing cases, under subparagraph (2)(c), the individual would have received the benefit of the consideration and would NOT be able to avoid the erroneous electronic record under this section.

7. In all cases not covered by paragraphs (1) or (2), where error or change to a record occur,

the parties contract, or other law, specifically including the law of mistake, applies to resolve any dispute. In the event that the parties' contract and other law would achieve different results, the construction of the parties' contract is left to the other law. If the error occurs in the context of record retention, Section 12 will apply. In that case the standard is one of accuracy and retrievability of the information.

8. Paragraph (4) makes the error correction provision in paragraph (2) and the application of the law of mistake in paragraph (3) non-variable. Paragraph (2) provides incentives for parties using electronic agents to establish safeguards for individuals dealing with them. It also avoids unjustified windfalls to the individual by erecting stringent requirements before the individual may exercise the right of avoidance under the paragraph. Therefore, there is no reason to permit parties to avoid the paragraph by agreement. Rather, parties should satisfy the paragraph's requirements.

28-50-111. Notarization and acknowledgment. — If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

History.

I.C., § 28-50-111, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

This section permits a notary public and other authorized officers to act electronically, effectively removing the stamp/seal requirements. However, the section does not eliminate any of the other requirements of notarial laws, and consistent with the entire thrust of this Act, simply allows the signing and information to be accomplished in an electronic medium.

For example, Buyer wishes to send a notarized Real Estate Purchase Agreement to Seller via e-mail. The notary must appear in the room with the Buyer, satisfy him/herself as to the identity of the Buyer, and swear to that identification. All that activity must be reflected as part of the electronic Purchase Agreement and the notary's electronic signature must appear as a part of the electronic real estate purchase contract.

As another example, Buyer seeks to send Seller an affidavit averring defects in the products received. A court clerk, authorized under state law to administer oaths, is present with Buyer in a room. The Clerk administers the oath and includes the statement of the oath, together with any other requisite information, in the electronic record to be sent to the Seller. Upon administering the oath and witnessing the application of Buyer's electronic signature to the electronic record, the Clerk also applies his electronic signature to the electronic record. So long as all substantive requirements of other applicable law have been fulfilled and are reflected in the electronic record, the sworn electronic record of Buyer is as effective as if it had been transcribed on paper.

28-50-112. Retention of electronic records — Originals. — (a) If a

law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

- (1) Accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and
- (2) Remains accessible for later reference.

(b) A requirement to retain a record in accordance with subsection (a) of this section does not apply to any information, the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) of this section by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a) of this section.

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a) of this section.

(f) A record retained as an electronic record in accordance with subsection (a) of this section satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the initial effective date of this chapter specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

History.

I.C., § 28-50-112, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. This section deals with the serviceability of electronic records as retained records and originals. So long as there exists reliable assurance that the electronic record accurately reproduces the information, this section continues the theme of establishing the functional equivalence of electronic and paper-based records. This is consistent with Fed.R.Evid. 1001(3) and Unif.R.Evid. 1001(3) (1974). This section assures that information stored electronically will remain effective for all audit, evidentiary, archival and similar purposes.

2. In an electronic medium, the concept of an original document is problematic. For example, as one drafts a document on a computer the "original" is either on a disc or the hard drive to which the document has been initially saved. If one periodically saves the draft, the fact is that at times a document may be first saved to disc then to hard drive, and at others vice versa. In such a case the "original" may change from the information

on the disc to the information on the hard drive. Indeed, it may be argued that the "original" exists solely in RAM and, in a sense, the original is destroyed when a "copy" is saved to a disc or to the hard drive. In any event, in the context of record retention, the concern focuses on the integrity of the information, and not with its "originality."

3. Subsection (a) requires accuracy and the ability to access at a later time. The requirement of accuracy is derived from the Uniform and Federal Rules of Evidence. The requirement of continuing accessibility addresses the issue of technology obsolescence and the need to update and migrate information to developing systems. It is not unlikely that within the span of 5-10 years (a period during which retention of much information is required) a corporation may evolve through one or more generations of technology. More to the point, this technology may be incompatible with each other necessitating the reconversion of information from one system to the other.

For example, certain operating systems from the early 1980's, e.g., memory typewriters, became obsolete with the development of personal computers. The information originally stored on the memory typewriter would need to be converted to the personal computer system in a way meeting the standards for accuracy contemplated by this section. It is also possible that the medium on which the information is stored is less stable. For example, information stored on floppy discs is generally less stable, and subject to a greater threat of disintegration, than information stored on a computer hard drive. In either case, the continuing accessibility issue must be satisfied to validate information stored by electronic means under this section.

This section permits parties to convert original written records to electronic records for retention so long as the requirements of subsection (a) are satisfied. Accordingly, in the absence of specific requirements to retain written records, written records may be destroyed once saved as electronic records satisfying the requirements of this section.

The subsection refers to the information contained in an electronic record, rather than relying on the term electronic record, as a matter of clarity that the critical aspect in retention is the information itself. What information must be retained is determined by the purpose for which the information is needed. If the addressing and pathway information regarding an e-mail is relevant, then that information should also be retained. However if it is the substance of the e-mail that is relevant, only that information need be retained. Of course, wise record retention would include all such information since what information will be relevant at a later time will not be known.

4. Subsections (b) and (c) simply make clear that certain ancillary information or the use of third parties, does not affect the serviceability of records and information retained electronically. Again, the relevance of particular information will not be known until that information is required at a subsequent time.

5. Subsection (d) continues the theme of the Act as validating electronic records as originals where the law requires retention of an original. The validation of electronic records and electronic information as originals is consistent with the Uniform Rules of Evidence. See Uniform Rules of Evidence 1001(3), 1002, 1003 and 1004.

6. Subsection (e) specifically addresses particular concerns regarding check retention statutes in many jurisdictions. A Report compiled by the Federal Reserve Bank of Boston identifies hundreds of state laws which require the retention or production of original canceled checks. Such requirements preclude banks and their customers from realizing the benefits and efficiencies related to truncation processes otherwise validated under current law. The benefits to banks and their customers from electronic check retention are effectuated by this provision.

7. Subsections (f) and (g) generally address other record retention statutes. As with check retention, all businesses and individuals may realize significant savings from electronic record retention. So long as the standards in Section 12 are satisfied, this section permits all parties to obtain those benefits. As always the government may require records in any medium, however, these subsections require a governmental agency to specifically identify the types of records and requirements that will be imposed.

28-50-113. Admissibility in evidence. — In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

History.

I.C., § 28-50-113, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

Like Section 7, this section prevents the nonrecognition of electronic records and signatures solely on the ground of the media in which information is presented.

Nothing in this section relieves a party

from establishing the necessary foundation for the admission of an electronic record. See Uniform Rules of Evidence 1001(3), 1002, 1003 and 1004.

28-50-114. Automated transaction. — In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the

parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(3) The terms of the contract are determined by the substantive law applicable to it.

History.

I.C., § 28-50-114, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. This section confirms that contracts can be formed by machines functioning as electronic agents for parties to a transaction. It negates any claim that lack of human intent, at the time of contract formation, prevents contract formation. When machines are involved, the requisite intention flows from the programing and use of the machine. As in other cases, these are salutary provisions consistent with the fundamental purpose of the Act to remove barriers to electronic transactions while leaving the substantive law, e.g., law of mistake, law of contract formation, unaffected to the greatest extent possible.

2. The process in paragraph (2) validates an anonymous click-through transaction. It is possible that an anonymous click-through process may simply result in no recognizable legal relationship, e.g., A goes to a person's website and acquires access without in any way identifying herself, or otherwise indicating agreement or assent to any limitation or obligation, and the owner's site grants A access. In such a case no legal relationship has been created.

On the other hand it may be possible that A's actions indicate agreement to a particular term. For example, A goes to a website and is confronted by an initial screen which advises her that the information at this site is proprietary, that A may use the information for her own personal purposes, but that, by clicking below, A agrees that any other use without the site owner's permission is prohibited. If A

clicks "agree" and downloads the information and then uses the information for other, prohibited purposes, should not A be bound by the click? It seems the answer properly should be, and would be, yes.

If the owner can show that the only way A could have obtained the information was from his website, and that the process to access the subject information required that A must have clicked the "I agree" button after having the ability to see the conditions on use, A has performed actions which A was free to refuse, which A knew would cause the site to grant her access, i.e., "complete the transaction." The terms of the resulting contract will be determined under general contract principles, but will include the limitation on A's use of the information, as a condition precedent to granting her access to the information.

3. In the transaction set forth in Comment 2, the record of the transaction also will include an electronic signature. By clicking "I agree" A adopted a process with the intent to "sign," i.e., bind herself to a legal obligation, the resulting record of the transaction. If a "signed writing" were required under otherwise applicable law, this transaction would be enforceable. If a "signed writing" were not required, it may be sufficient to establish that the electronic record is attributable to A under Section 9. Attribution may be shown in any manner reasonable including showing that, of necessity, A could only have gotten the information through the process at the website.

28-50-115. Time and place of sending and receipt. — (a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the

purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) Is in a form capable of being processed by that system; and

(3) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:

(1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

(c) Subsection (b) of this section applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d) of this section.

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) If the sender or recipient has more than one (1) place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subsection (b) of this section even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) of this section establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a) of this section, or purportedly received under subsection (b) of this section, was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

History.

I.C., § 28-50-115, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. This section provides default rules regarding when and from where an electronic record is sent and when and where an electronic record is received. This section does not

address the efficacy of the record that is sent or received. That is, whether a record is unintelligible or unusable by a recipient is a separate issue from whether that record was

sent or received. The effectiveness of an illegible record, whether it binds any party, are questions left to other law.

2. Subsection (a) furnishes rules for determining when an electronic record is sent. The effect of the sending and its import are determined by other law once it is determined that a sending has occurred.

In order to have a proper sending, the subsection requires that information be properly addressed or otherwise directed to the recipient. In order to send within the meaning of this section, there must be specific information which will direct the record to the intended recipient. Although mass electronic sending is not precluded, a general broadcast message, sent to systems rather than individuals, would not suffice as a sending.

The record will be considered sent once it leaves the control of the sender, or comes under the control of the recipient. Records sent through e-mail or the internet will pass through many different server systems. Accordingly, the critical element when more than one system is involved is the loss of control by the sender.

However, the structure of many message delivery systems is such that electronic records may actually never leave the control of the sender. For example, within a university or corporate setting, e-mail sent within the system to another faculty member is technically not out of the sender's control since it never leaves the organization's server. Accordingly, to qualify as a sending, the e-mail must arrive at a point where the recipient has control. This section does not address the effect of an electronic record that is thereafter "pulled back," e.g., removed from a mailbox. The analog in the paper world would be removing a letter from a person's mailbox. As in the case of providing information electronically under Section 8, the recipient's ability to receive a message should be judged from the perspective of whether the sender has done any action which would preclude retrieval. This is especially the case in regard to sending, since the sender must direct the record to a system designated or used by the recipient.

3. Subsection (b) provides simply that when a record enters the system which the recipient has designated or uses and to which it has access, in a form capable of being processed by that system, it is received. Keying receipt to a system accessible by the recipient removes the potential for a recipient leaving messages with a server or other service in order to avoid receipt. However, the section does not resolve the issue of how the sender proves the time of receipt.

To assure that the recipient retains control of the place of receipt, subsection (b) requires that the system be specified or used by the

recipient, and that the system be used or designated for the type of record being sent. Many people have multiple e-mail addresses for different purposes. Subsection (b) assures that recipients can designate the e-mail address or system to be used in a particular transaction. For example, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes. Whether actual knowledge upon seeing it at home would qualify as receipt is determined under the otherwise applicable substantive law.

4. Subsections (c) and (d) provide default rules for determining where a record will be considered to have been sent or received. The focus is on the place of business of the recipient and not the physical location of the information processing system, which may bear absolutely no relation to the transaction between the parties. It is not uncommon for users of electronic commerce to communicate from one State to another without knowing the location of information systems through which communication is operated. In addition, the location of certain communication systems may change without either of the parties being aware of the change. Accordingly, where the place of sending or receipt is an issue under other applicable law, e.g., conflict of laws issues, tax issues, the relevant location should be the location of the sender or recipient and not the location of the information processing system.

Subsection (d) assures individual flexibility in designating the place from which a record will be considered sent or at which a record will be considered received. Under subsection (d) a person may designate the place of sending or receipt unilaterally in an electronic record. This ability, as with the ability to designate by agreement, may be limited by otherwise applicable law to places having a reasonable relationship to the transaction.

5. Subsection (e) makes clear that receipt is not dependent on a person having notice that the record is in the person's system. Receipt occurs when the record reaches the designated system whether or not the recipient ever retrieves the record. The paper analog is the recipient who never reads a mail notice.

6. Subsection (f) provides legal certainty regarding the effect of an electronic acknowledgment. It only addresses the fact of receipt, not the quality of the content, nor whether the electronic record was read or "opened."

7. Subsection (g) limits the parties' ability to vary the method for sending and receipt

provided in subsections (a) and (b), when there is a legal requirement for the sending or receipt. As in other circumstances where legal requirements derive from other substantive law, to the extent that the other law permits

variation by agreement, this Act does not impose any additional requirements, and provisions of this Act may be varied to the extent provided in the other law.

28-50-116. Transferable record. — (a) In this section, “transferable record” means an electronic record that:

(1) Would be a note under chapter 3, title 28, Idaho Code (uniform commercial code — negotiable instruments) or a document under chapter 7, title 28, Idaho Code (uniform commercial code — documents of title) if the electronic record were in writing; and

(2) The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies subsection (b) of this section, and a person is deemed to have control of a transferable record, if the transferable record is created, stored and assigned in such a manner that:

(1) A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5) and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the person asserting control as:

(A) The person to which the transferable record was issued; or

(B) If the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in section 28-1-201(b)(21), Idaho Code, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under chapters 1 through 12, title 28, Idaho Code (uniform commercial code), including, if the applicable statutory requirements under section 28-3-302(1), 28-7-501 or 28-9-330, Idaho Code, are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent

records or writings under chapters 1 through 12, title 28, Idaho Code (uniform commercial code).

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

History.

I.C., § 28-50-116, as added by 2000, ch. 286, § 1, p. 959; am. 2001, ch. 208, § 24, p.

704; am. 2004, ch. 42, § 35, p. 77; am. 2004, ch. 43, § 44, p. 136.

STATUTORY NOTES

Amendments.

This section was amended by two 2004 acts which appear to be compatible and have been compiled together.

The 2004 amendment, by ch. 42, deleted “warehouse receipts, bills of lading and other” preceding “documents of title” in the second parenthetical reference in paragraph (a)(1).

The 2004 amendment, by ch. 43, substituted “section 28-1-201(b)(21)” for “section 28-

1-201(20)” in the first sentence of subsection (d).

Compiler’s Notes.

The words enclosed in parentheses so appeared in the law as enacted.

Effective Dates.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

COMMENT TO OFFICIAL TEXT

1. Paper negotiable instruments and documents are unique in the fact that a tangible token — a piece of paper — actually embodies intangible rights and obligations. The extreme difficulty of creating a unique electronic token which embodies the singular attributes of a paper negotiable document or instrument dictates that the rules relating to negotiable documents and instruments not be simply amended to allow the use of an electronic record for the requisite paper writing. However, the desirability of establishing rules by which business parties might be able to acquire some of the benefits of negotiability in an electronic environment is recognized by the inclusion of this section on Transferable Records.

This section provides legal support for the creation, transferability and enforceability of electronic note and document equivalents, as against the issuer/obligor. The certainty created by the section provides the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents.

The importance of facilitating the development of systems which will permit electronic equivalents is a function of cost, efficiency and safety for the records. The storage cost and

space needed for the billions of paper notes and documents is phenomenal. Further, natural disasters can wreak havoc on the ability to meet legal requirements for retaining, retrieving and delivering paper instruments. The development of electronic systems meeting the rigorous standards of this section will permit retention of copies which reflect the same integrity as the original. As a result storage, transmission and other costs will be reduced, while security and the ability to satisfy legal requirements governing such paper records will be enhanced.

Section 16 provides for the creation of an electronic record which may be controlled by the holder, who in turn may obtain the benefits of holder in due course and good faith purchaser status. If the benefits and efficiencies of electronic media are to be realized in this industry it is essential to establish a means by which transactions involving paper promissory notes may be accomplished completely electronically. Particularly as other aspects of such transactions are accomplished electronically, the drag on the transaction of requiring a paper note becomes evident. In addition to alleviating the logistical problems of generating, storing and retrieving paper, the mailing and transmission costs associated with such transactions will also be reduced.

2. The definition of transferable record is limited in two significant ways. First, only the equivalent of paper promissory notes and paper documents of title can be created as transferable records. Notes and Documents of Title do not impact the broad systems that relate to the broader payments mechanisms related, for example, to checks. Impacting the check collection system by allowing for "electronic checks" has ramifications well beyond the ability of this Act to address. Accordingly, this Act excludes from its scope transactions governed by UCC Articles 3 and 4. The limitation to promissory note equivalents in Section 16 is quite important in that regard because of the ability to deal with many enforcement issues by contract without affecting such systemic concerns.

Second, not only is Section 16 limited to electronic records which would qualify as negotiable promissory notes or documents if they were in writing, but the issuer of the electronic record must expressly agree that the electronic record is to be considered a transferable record. The definition of transferable record as "an electronic record that ... the issuer of the electronic record expressly has agreed is a transferable record" indicates that the electronic record itself will likely set forth the issuer's agreement, though it may be argued that a contemporaneous electronic or written record might set forth the issuer's agreement. However, conversion of a paper note issued as such would not be possible because the issuer would not be the issuer, in such a case, of an electronic record. The purpose of such a restriction is to assure that transferable records can only be created at the time of issuance by the obligor. The possibility that a paper note might be converted to an electronic record and then intentionally destroyed, and the effect of such action, was not intended to be covered by Section 16.

The requirement that the obligor expressly agree in the electronic record to its treatment as a transferable record does not otherwise affect the characterization of a transferable record (i.e., does not affect what would be a paper note) because it is a statutory condition. Further, it does not obligate the issuer to undertake to do any other act than the payment of the obligation evidenced by the transferable record. Therefore, it does not make the transferable record "conditional" within the meaning of Section 3-104(a)(3) of the Uniform Commercial Code.

3. Under Section 16 acquisition of "control" over an electronic record serves as a substitute for "possession" in the paper analog. More precisely, "control" under Section 16 serves as the substitute for delivery, indorsement and possession of a negotiable promissory note or negotiable document of title. Section 16(b) allows control to be found so

long as "a system employed for evidencing the transfer of interests in the transferable record reliably establishes [the person claiming control] as the person to which the transferable record was issued or transferred." The key point is that a system, whether involving third party registry or technological safeguards, must be shown to reliably establish the identity of the person entitled to payment. Section 16(c) then sets forth a safe harbor list of very strict requirements for such a system. The specific provisions listed in Section 16(c) are derived from Section 105 of Revised Article 9 of the Uniform Commercial Code. Generally, the transferable record must be unique, identifiable, and except as specifically permitted, unalterable. That "authoritative copy" must (i) identify the person claiming control as the person to whom the record was issued or most recently transferred, (ii) be maintained by the person claiming control or its designee, and (iii) be unalterable except with the permission of the person claiming control. In addition any copy of the authoritative copy must be readily identifiable as a copy and all revisions must be readily identifiable as authorized or unauthorized.

The control requirements may be satisfied through the use of a trusted third party registry system. Such systems are currently in place with regard to the transfer of securities entitlements under Article 8 of the Uniform Commercial Code, and in the transfer of cotton warehouse receipts under the program sponsored by the United States Department of Agriculture. This Act would recognize the use of such a system so long as the standards of subsection (c) were satisfied. In addition, a technological system which met such exacting standards would also be permitted under Section 16.

For example, a borrower signs an electronic record which would be a promissory note or document if it were paper. The borrower specifically agrees in the electronic record that it will qualify as a transferable record under this section. The lender implements a newly developed technological system which dates, encrypts, and stores all the electronic information in the transferable record in a manner which lender can demonstrate reliably establishes lender as the person to which the transferable record was issued. In the alternative, the lender may contract with a third party to act as a registry for all such transferable records, retaining records establishing the party to whom the record was issued and all subsequent transfers of the record. An example of this latter method for assuring control is the system established for the issuance and transfer of electronic cotton warehouse receipts under 7 C.F.R. section 735 et seq.

Of greatest importance in the system used is the ability to securely and demonstrably be able to transfer the record to others in a manner which assures that only one "holder" exists. The need for such certainty and security resulted in the very stringent standards for a system outlined in subsection (c). A system relying on a third party registry is likely the most effective way to satisfy the requirements of subsection (c) that the transferable record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified.

It must be remembered that Section 16 was drafted in order to provide sufficient legal certainty regarding the rights of those in control of such electronic records, that legal incentives would exist to warrant the development of systems which would establish the requisite control. During the drafting of Section 16, representatives from the Federal Reserve carefully scrutinized the impact of any electronicization of any aspect of the national payment system. Section 16 represents a compromise position which, as noted, serves as a bridge pending more detailed study and consideration of what legal changes, if any, are necessary or appropriate in the context of the payment systems impacted. Accordingly, Section 16 provides limited scope for the attainment of important rights derived from the concept of negotiability, in order to permit the development of systems which will satisfy its strict requirements for control.

4. It is important to note what the section does not provide. Issues related to enforceability against intermediate transferees and transferors (i.e., indorser liability under a paper note), warranty liability that would attach in a paper note, and issues of the effect of taking a transferable record on the underlying obligation, are NOT addressed by this section. Such matters must be addressed, if at all, by contract between and among the parties in the chain of transmission and transfer of the transferable record. In the event that such matters are not addressed by the contract, the issues would need to be resolved under otherwise applicable law. Other law may include general contract principles of assignment and assumption, or may include rules from Article 3 of the Uniform Commercial Code applied by analogy.

For example, Issuer agrees to pay a debt by means of a transferable record issued to A. Unless there is agreement between issuer and A that the transferable record "suspends" the underlying obligation (see Section 3-310 of the Uniform Commercial Code), A would not be prevented from enforcing the underlying obligation without the transferable record. Similarly, if A transfers the transferable record to B by means granting B control, B may

obtain holder in due course rights against the obligor/issuer, but B's recourse against A would not be clear unless A agreed to remain liable under the transferable record. Although the rules of Article 3 may be applied by analogy in an appropriate context, in the absence of an express agreement in the transferable record or included by applicable system rules, the liability of the transferor would not be clear.

5. Current business models exist which rely for their efficacy on the benefits of negotiability. A principal example, and one which informed much of the development of Section 16, involves the mortgage backed securities industry. Aggregators of commercial paper acquire mortgage secured promissory notes following a chain of transfers beginning with the origination of the mortgage loan by a mortgage broker. In the course of the transfers of this paper, buyers of the notes and lenders/secured parties for these buyers will intervene. For the ultimate purchaser of the paper, the ability to rely on holder in due course and good faith purchaser status creates the legal security necessary to issue its own investment securities which are backed by the obligations evidenced by the notes purchased. Only through their HIDC status can these purchasers be assured that third party claims will be barred. Only through their HIDC status can the end purchaser avoid the incredible burden of requiring and assuring that each person in the chain of transfer has waived any and all defenses to performance which may be created during the chain of transfer.

6. This section is a stand-alone provision. Although references are made to specific provisions in Article 3, Article 7, and Article 9 of the Uniform Commercial Code, these provisions are incorporated into this Act and made the applicable rules for purposes of this Act. The rights of parties to transferable records are established under subsections (d) and (e). Subsection (d) provides rules for determining the rights of a party in control of a transferable record. The subsection makes clear that the rights are determined under this section, and not under other law, by incorporating the rules on the manner of acquisition into this statute. The last sentence of subsection (d) is intended to assure that requirements related to notions of possession, which are inherently inconsistent with the idea of an electronic record, are not incorporated into this statute.

If a person establishes control, Section 16(d) provides that that person is the "holder" of the transferable record which is equivalent to a holder of an analogous paper negotiable instrument. More importantly, if the person acquired control in a manner which would make it a holder in due course of an equivalent paper record, the person acquires the

rights of a HIDC. The person in control would therefore be able to enforce the transferable record against the obligor regardless of intervening claims and defenses. However, by pulling these rights into Section 16, this Act does NOT validate the wholesale electrification of promissory notes under Article 3 of the Uniform Commercial Code.

Further, it is important to understand that a transferable record under Section 16, while having no counterpart under Article 3 of the Uniform Commercial Code, would be an "account," "general intangible," or "payment intangible" under Article 9 of the Uniform Commercial Code. Accordingly, two separate bodies of law would apply to that asset of the obligee. A taker of the transferable record under Section 16 may acquire purchaser rights under Article 9 of the Uniform Commercial Code, however, those rights may be defeated by a trustee in bankruptcy of a prior person in control unless perfection under Article 9 of the Uniform Commercial Code by filing is achieved. If the person in control also takes control in a manner granting it holder in due course status, of course that person would take free of any claim by a bankruptcy trustee or lien creditor.

7. Subsection (e) accords to the obligor of the transferable record rights equal to those of an obligor under an equivalent paper record. Accordingly, unless a waiver of defense clause is obtained in the electronic record, or the transferee obtains HDC rights under subsection (d), the obligor has all the rights and

defenses available to it under a contract assignment. Additionally, the obligor has the right to have the payment noted or otherwise included as part of the electronic record.

8. Subsection (f) grants the obligor the right to have the transferable record and other information made available for purposes of assuring the correct person to pay. This will allow the obligor to protect its interest and obtain the defense of discharge by payment or performance. This is particularly important because a person receiving subsequent control under the appropriate circumstances may well qualify as a holder in course who can enforce payment of the transferable record.

9. Section 16 is a singular exception to the thrust of this Act to simply validate electronic media used in commercial transactions. Section 16 actually provides a means for expanding electronic commerce. It provides certainty to lenders and investors regarding the enforceability of a new class of financial services. It is hoped that the legal protections afforded by Section 16 will engender the development of technological and business models which will permit realization of the significant cost savings and efficiencies available through electronic transacting in the financial services industry. Although only a bridge to more detailed consideration of the broad issues related to negotiability in an electronic context, Section 16 provides the impetus for that broader consideration while allowing continuation of developing technological and business models.

28-50-117. Creation and retention of electronic records and conversion of written records by governmental agencies. — Each governmental agency of this state shall determine whether, and the extent to which, it will create and retain electronic records and convert written records to electronic records.

History.

I.C., § 28-50-117, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

See Comments following Section 19.

28-50-118. Acceptance and distribution of electronic records by governmental agencies. — (a) Except as otherwise provided in section 28-50-112(f), Idaho Code, each governmental agency of this state shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use and rely upon electronic records and electronic signatures.

(b) To the extent that a governmental agency uses electronic records and

electronic signatures under subsection (a) of this section, the governmental agency, giving due consideration to security, may specify:

(1) The manner and format in which the electronic records must be created, generated, sent, communicated, received and stored and the systems established for those purposes;

(2) If electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;

(3) Control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality and auditability of electronic records; and

(4) Any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in section 28-50-112(f), Idaho Code, this chapter does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

History.

I.C., § 28-50-118, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

See Comments following Section 19.

28-50-119. Interoperability. — The governmental agency of this state which adopts standards pursuant to section 28-50-118, Idaho Code, may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

History.

I.C., § 28-50-119, as added by 2000, ch. 286, § 1, p. 959.

COMMENT TO OFFICIAL TEXT

1. Sections 17-19 have been bracketed as optional provisions to be considered for adoption by each State. Among the barriers to electronic commerce are barriers which exist in the use of electronic media by state governmental agencies — whether among themselves or in external dealing with the private sector. In those circumstances where the government acts as a commercial party, e.g., in

areas of procurement, the general validation provisions of this Act will apply. That is to say, the government must agree to conduct transactions electronically with vendors and customers of government services.

However, there are other circumstances when government ought to establish the ability to proceed in transactions electronically. Whether in regard to records and communi-

cations within and between governmental agencies, or with respect to information and filings which must be made with governmental agencies, these sections allow a State to establish the ground work for such electronicization.

2. The provisions in Sections 17-19 are broad and very general. In many States they will be unnecessary because enacted legislation designed to facilitate governmental use of electronic records and communications is in place. However, in many States broad validating rules are needed and desired. Accordingly, this Act provides these sections as a baseline.

Of paramount importance in all States however, is the need for States to assure that whatever systems and rules are adopted, the systems established are compatible with the systems of other governmental agencies and with common systems in the private sector. A very real risk exists that implementation of systems by myriad governmental agencies and offices may create barriers because of a failure to consider compatibility, than would be the case otherwise.

3. The provisions in Section 17-19 are broad and general to provide the greatest flexibility and adaptation to the specific needs of the individual States. The differences and variations in the organization and structure of governmental agencies mandates this approach. However, it is imperative that each State always keep in mind the need to prevent the erection of barriers through appropriate coordination of systems and rules within the parameters set by the State.

4. Section 17 authorizes state agencies to use electronic records and electronic signatures generally for intra-governmental purposes, and to convert written records and manual signatures to electronic records and electronic signatures. By its terms the section gives enacting legislatures the option to leave the decision to use electronic records or convert written records and signatures to the governmental agency or assign that duty to a designated state officer. It also authorizes the destruction of written records after conversion to electronic form.

5. Section 18 broadly authorizes state agencies to send and receive electronic records and signatures in dealing with non-governmental persons. Again, the provision is permissive and not obligatory (see subsection (c)). However, it does provide specifically that with respect to electronic records used for evidentiary purposes, Section 12 will apply unless a particular agency expressly opts out.

6. Section 19 is the most important section of the three. It requires governmental agencies or state officers to take account of consistency in applications and interoperability to the extent practicable when promulgating standards. This section is critical in addressing the concern that inconsistent applications may promote barriers greater than currently exist. Without such direction the myriad systems that could develop independently would be new barriers to electronic commerce, not a removal of barriers. The key to interoperability is flexibility and adaptability. The requirement of a single system may be as big a barrier as the proliferation of many disparate systems.

28-50-120. Severability clause. — If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

History.

I.C., § 28-50-120, as added by 2000, ch. 286, § 1, p. 959.

CHAPTER 51

IDENTITY THEFT

SECTION.

28-51-101. Definitions. [Repealed.]

28-51-102. Block of information appearing as a result of a violation of criminal code provision prohibiting misappropriation of personal information. [Repealed.]

28-51-103. Payment card receipts.

28-51-104. Definitions.

SECTION.

28-51-105. Disclosure of breach of security of computerized personal information by an agency, individual or a commercial entity.

28-51-106. Procedures deemed in compliance with security breach requirements.

28-51-107. Violations.

28-51-101. Definitions. [Repealed.]**STATUTORY NOTES****Compiler's Notes.**

This section, which comprised I.C., § 28-50-101, as added by 2000, ch. 422, § 1, p. 1371; am. and redesign. 2005, ch. 25, § 37, p.

82, was repealed by S.L. 2008, ch. 177, § 1. For present comparable provisions, see § 28-52-101 et seq.

28-51-102. Block of information appearing as a result of a violation of criminal code provision prohibiting misappropriation of personal information. [Repealed.]**STATUTORY NOTES****Compiler's Notes.**

This section, which comprised I.C., § 28-50-102, as added by 2000, ch. 422, § 1, p. 1371; am. and redesign. 2005, ch. 25, § 38, p.

82, was repealed by S.L. 2008, ch. 177, § 1. For present comparable provisions, see § 28-52-101 et seq.

28-51-103. Payment card receipts. — (1) As used in this section, the term:

(a) "Cardholder" means a person or organization named on the face of a payment card to whom or for whose benefit the payment card is issued.

(b) "Merchant" means a person or organization who receives from a cardholder a payment card, or information from a payment card, as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from the person or organization.

(c) "Payment card" means a credit card, charge card, debit card, or any other card that is issued to a cardholder and that allows the cardholder to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.

(2) A merchant who accepts a payment card for the transaction of business may not print more than the last five (5) digits of the payment card's account number or print the payment card's expiration date on a receipt provided to the cardholder. This subsection does not apply to a transaction in which the sole means of recording the payment card's account number or expiration date is by handwriting or by an imprint or copy of the payment card. Effective January 1, 2004, this section applies to all receipts that are electronically printed using a cash register or other machine or device that is first used on or after July 1, 2003. Effective January 1, 2005, this section applies to all receipts that are electronically printed, including those printed using a cash register or other machine or device that is first used before July 1, 2003.

(3) A merchant who violates this section shall be subject to a civil penalty of not more than two hundred fifty dollars (\$250) for the first violation and one thousand dollars (\$1,000) for a second or subsequent violation. An action to recover the civil penalty may be brought by a prosecuting attorney. If the prosecuting attorney does not file an action for such a civil penalty within sixty (60) days from the date the violation is reported by the cardholder whose payment card number was printed on a receipt in violation of this

section, the cardholder may file such action. Venue for an action under this section shall be in the county in which the transaction occurred or the county in which the cardholder resides or the county in which the merchant has its principal place of business in this state.

The penalties provided in this section are in addition to any other remedy at law or equity available to a cardholder.

Any civil penalty imposed pursuant to this section shall be deposited in the state general fund. Attorney's fees shall be paid solely to the party successfully bringing the action.

History.

I.C., § 28-51-103, as added by 2003, ch. 134, § 2, p. 391.

STATUTORY NOTES

Cross References.

General fund, § 67-1205.

28-51-104. Definitions. — For purposes of sections 28-51-104 through 28-51-107, Idaho Code:

(1) "Agency" means any "public agency" as defined in section 9-337, Idaho Code.

(2) "Breach of the security of the system" means the illegal acquisition of unencrypted computerized data that materially compromises the security, confidentiality, or integrity of personal information for one (1) or more persons maintained by an agency, individual or a commercial entity. Good faith acquisition of personal information by an employee or agent of an agency, individual or a commercial entity for the purposes of the agency, individual or the commercial entity is not a breach of the security of the system, provided that the personal information is not used or subject to further unauthorized disclosure.

(3) "Commercial entity" includes corporation, business trust, estate, trust, partnership, limited partnership, limited liability partnership, limited liability company, association, organization, joint venture and any other legal entity, whether for profit or not-for-profit.

(4) "Notice" means:

(a) Written notice to the most recent address the agency, individual or commercial entity has in its records;

(b) Telephonic notice;

(c) Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in 15 U.S.C. section 7001; or

(d) Substitute notice, if the agency, individual or the commercial entity required to provide notice demonstrates that the cost of providing notice will exceed twenty-five thousand dollars (\$25,000), or that the number of Idaho residents to be notified exceeds fifty thousand (50,000), or that the agency, individual or the commercial entity does not have sufficient contact information to provide notice. Substitute notice consists of all of the following:

- (i) E-mail notice if the agency, individual or the commercial entity has e-mail addresses for the affected Idaho residents; and
- (ii) Conspicuous posting of the notice on the website page of the agency, individual or the commercial entity if the agency, individual or the commercial entity maintains one; and
- (iii) Notice to major statewide media.

(5) “Personal information” means an Idaho resident’s first name or first initial and last name in combination with any one (1) or more of the following data elements that relate to the resident, when either the name or the data elements are not encrypted:

- (a) Social security number;
- (b) Driver’s license number or Idaho identification card number; or
- (c) Account number, or credit or debit card number, in combination with any required security code, access code, or password that would permit access to a resident’s financial account.

The term “personal information” does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records or widely distributed media.

(6) “Primary regulator” of a commercial entity or individual licensed or chartered by the United States is that commercial entity’s or individual’s primary federal regulator, the primary regulator of a commercial entity or individual licensed by the department of finance is the department of finance, the primary regulator of a commercial entity or individual licensed by the department of insurance is the department of insurance and, for all agencies and all other commercial entities or individuals, the primary regulator is the attorney general.

History.

I.C., § 28-51-104, as added by 2006, ch. 258, § 1, p. 796.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Department of finance, § 67-2701 et se.

Department of insurance, § 41-201 et seq.

28-51-105. Disclosure of breach of security of computerized personal information by an agency, individual or a commercial entity.

— (1) A city, county or state agency, individual or a commercial entity that conducts business in Idaho and that owns or licenses computerized data that includes personal information about a resident of Idaho shall, when it becomes aware of a breach of the security of the system, conduct in good faith a reasonable and prompt investigation to determine the likelihood that personal information has been or will be misused. If the investigation determines that the misuse of information about an Idaho resident has occurred or is reasonably likely to occur, the agency, individual or the commercial entity shall give notice as soon as possible to the affected Idaho resident. Notice must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement and consistent with any measures necessary to determine the

scope of the breach, to identify the individuals affected, and to restore the reasonable integrity of the computerized data system.

When an agency becomes aware of a breach of the security of the system, it shall, within twenty-four (24) hours of such discovery, notify the office of the Idaho attorney general. Nothing contained herein relieves a state agency's responsibility to report a security breach to the office of the chief information officer within the department of administration, pursuant to the information technology resource management council [Idaho technology authority] policies.

Any governmental employee that intentionally discloses personal information not subject to disclosure otherwise allowed by law, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than two thousand dollars (\$2,000), or by imprisonment in the county jail for a period of not more than one (1) year, or both.

(2) An agency, individual or a commercial entity that maintains computerized data that includes personal information that the agency, individual or the commercial entity does not own or license shall give notice to and cooperate with the owner or licensee of the information of any breach of the security of the system immediately following discovery of a breach, if misuse of personal information about an Idaho resident occurred or is reasonably likely to occur. Cooperation includes sharing with the owner or licensee information relevant to the breach.

(3) Notice required by this section may be delayed if a law enforcement agency advises the agency, individual or commercial entity that the notice will impede a criminal investigation. Notice required by this section must be made in good faith, without unreasonable delay and as soon as possible after the law enforcement agency advises the agency, individual or commercial entity that notification will no longer impede the investigation.

History.

I.C., § 28-51-105, as added by 2006, ch. 258, § 1, p. 796; am. 2010, ch. 170, § 1, p. 346.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

the first paragraph and added the second and third paragraphs.

Amendments.

The 2010 amendment, by ch. 170, in subsection (1), substituted "A city, county or state agency" for "An agency" at the beginning of

Compiler's Notes.

The bracketed insertion near the end of the second paragraph in subsection (1) was added by the compiler to account for a 2013 name change in § 67-5745B.

28-51-106. Procedures deemed in compliance with security breach requirements. — (1) An agency, individual or a commercial entity that maintains its own notice procedures as part of an information security policy for the treatment of personal information, and whose procedures are otherwise consistent with the timing requirements of section 28-51-105, Idaho Code, is deemed to be in compliance with the notice requirements of section 28-51-105, Idaho Code, if the agency, individual or the commercial

entity notifies affected Idaho residents in accordance with its policies in the event of a breach of security of the system.

(2) An individual or a commercial entity that is regulated by state or federal law and that maintains procedures for a breach of the security of the system pursuant to the laws, rules, regulations, guidances, or guidelines established by its primary or functional state or federal regulator is deemed to be in compliance with section 28-51-105, Idaho Code, if the individual or the commercial entity complies with the maintained procedures when a breach of the security of the system occurs.

History.

I.C., § 28-51-106, as added by 2006, ch. 258, § 1, p. 796.

28-51-107. Violations. — In any case in which an agency's, commercial entity's or individual's primary regulator has reason to believe that an agency, individual or commercial entity subject to that primary regulator's jurisdiction under section 28-51-104(6), Idaho Code, has violated section 28-51-105, Idaho Code, by failing to give notice in accordance with that section, the primary regulator may bring a civil action to enforce compliance with that section and enjoin that agency, individual or commercial entity from further violations. Any agency, individual or commercial entity that intentionally fails to give notice in accordance with section 28-51-105, Idaho Code, shall be subject to a fine of not more than twenty-five thousand dollars (\$25,000) per breach of the security of the system.

History.

I.C., § 28-51-107, as added by 2006, ch. 258, § 1, p. 796.

CHAPTER 52

CREDIT REPORT PROTECTION ACT

SECTION.

28-52-101. Short title.

28-52-102. Definitions.

28-52-103. Security freeze.

28-52-104. Removal of security freeze — Requirements and timing.

28-52-105. Exceptions.

28-52-106. Fees for security freeze.

SECTION.

28-52-107. Changes to information in a credit report subject to a security freeze.

28-52-108. Protection of personal information.

28-52-109. Enforcement.

28-52-101. Short title. — This chapter shall be known and cited as the "Credit Report Protection Act."

History.

I.C., § 28-52-101, as added by 2008, ch. 177, § 2, p. 523.

28-52-102. Definitions. — In this chapter:

(1) "Consumer" means a natural person.

(2) "Consumer reporting agency" means a person who, for fees, dues or on

a cooperative basis, regularly engages in whole or in part in the practice of assembling or evaluating information concerning a consumer's credit or other information for the purpose of furnishing a credit report to another person.

(3) "Credit report" means a consumer report, as defined in 15 U.S.C. section 1681a, that is used or collected, in whole or in part, for the purpose of serving as a factor in establishing a consumer's eligibility for credit for personal, family or household purposes.

(4) "Personal information" means personally identifiable financial information provided by a consumer to another person, resulting from any transaction with the consumer or any service performed for the consumer or otherwise obtained by another person. Personal information does not include publicly available information, as that term is defined by regulations prescribed under 15 U.S.C. section 6804, or any list, description or other grouping of consumers, and publicly available information pertaining to consumers that is derived without using any nonpublic personal information. Notwithstanding the foregoing, "personal information" includes any list, description or other grouping of consumers, and publicly available information pertaining to the consumers, that is derived using any nonpublic personal information other than publicly available information.

(5) "Proper identification" has the same meaning as in 15 U.S.C. section 1681h(a)(1) and includes:

- (a) The consumer's full name, including first, middle and last names and any suffix;
- (b) Any name the consumer previously used;
- (c) The consumer's current and recent full addresses, including street address, any apartment number, city, state and zip code;
- (d) The consumer's social security number; and
- (e) The consumer's date of birth.

(6) "Security freeze" means a prohibition, consistent with section 28-52-103, Idaho Code, on a consumer reporting agency's furnishing of a consumer's credit report to a third party intending to use the credit report to determine the consumer's eligibility for credit.

History.

I.C., § 28-52-102, as added by 2008, ch. 177, § 2, p. 523.

STATUTORY NOTES

Federal References.

For federal rules on privacy of consumer

financial information, see 12 C.F.R. § 1016.1 et seq.

28-52-103. Security freeze. — (1) A consumer may place a security freeze on the consumer's credit report by:

- (a) Making a request to a consumer reporting agency in writing by regular or certified mail at an address designated by the consumer reporting agency to receive the request;
- (b) Providing proper identification; and

(c) Paying the fee required by the consumer reporting agency in accordance with section 28-52-106, Idaho Code.

(2) Upon receiving a request from a consumer under subsection (1) of this section, the consumer reporting agency shall:

(a) Place a security freeze on the consumer's credit report within three (3) business days after receiving the consumer's request; and

(b) Within five (5) business days after placing the security freeze, send a written confirmation of the security freeze to the consumer and provide the consumer with a unique personal identification number or password to be used by the consumer when providing authorizations for removal or temporary lifts of the security freeze under section 28-52-104, Idaho Code.

(3) If a security freeze is in place, a consumer reporting agency may not release a consumer's credit report, or information from the credit report, to a third party that intends to use the information to determine a consumer's eligibility for credit without prior authorization from the consumer.

(4) Notwithstanding subsection (3) of this section, a consumer reporting agency may communicate to a third party requesting a consumer's credit report that a security freeze is in effect on the consumer's credit report. If a third party requesting a consumer's credit report in connection with the consumer's application for credit is notified of the existence of a security freeze under this section, the third party may treat the consumer's application as incomplete.

(5) A consumer reporting agency shall require proper identification of the consumer requesting to place, remove or temporarily remove a security freeze.

(6) A consumer reporting agency shall develop a contact method to receive and process a consumer's request to permanently remove or temporarily lift a security freeze. The contact method may include: a postal address; an electronic contact method chosen by the consumer reporting agency, which may include the use of fax, internet or other electronic means; or the use of telephone in a manner that is consistent with any federal requirements placed on the consumer reporting agency. By no later than September 1, 2008, a consumer reporting agency shall develop a secure electronic means for a consumer to request the temporary lift of a security freeze.

(7) A security freeze placed under this section may be removed only in accordance with section 28-52-104, Idaho Code.

History.

I.C., § 28-52-103, as added by 2008, ch. 177, § 2, p. 523.

28-52-104. Removal of security freeze — Requirements and timing. — (1) A consumer reporting agency may remove a security freeze from a consumer's credit report only if the consumer reporting agency receives the consumer's request through a contact method established and required in accordance with subsection (6) of section 28-52-103, Idaho Code, and the consumer reporting agency receives the consumer's proper identification and other information sufficient to identify the consumer, including the

consumer's personal identification number or password; or the consumer makes a material misrepresentation of fact in connection with the placement of the security freeze and the consumer reporting agency notifies the consumer in writing before removing the security freeze.

(2) A consumer reporting agency shall temporarily lift a security freeze upon receipt of the consumer's request through the contact method established by the consumer reporting agency in accordance with subsection (6) of section 28-52-103, Idaho Code, along with:

- (a) The consumer's proper identification and other information sufficient to identify the consumer;
- (b) The consumer's personal identification number or password;
- (c) The proper information regarding the third party who is to receive the credit report or the time period for which the credit report is to be available to users of the credit report; and
- (d) A fee, if applicable.

(3) A consumer reporting agency shall remove or temporarily lift a security freeze from a consumer's credit report as follows:

- (a) Except as provided in paragraph (b) of this subsection regarding temporary lifts, within three (3) business days after the business day on which the consumer's written request to remove or temporarily lift the security freeze is received by the consumer reporting agency using a contact method chosen by the consumer reporting agency in accordance with subsection (6) of section 28-52-103, Idaho Code; and
- (b) On and after September 1, 2008, within fifteen (15) minutes after the consumer's request to temporarily lift the security freeze is received by the consumer reporting agency through the electronic contact method chosen by the consumer reporting agency in accordance with subsection (6) of section 28-52-103, Idaho Code, if such request is received between 6:00 a.m. and 9:30 p.m. mountain time.

(4) A consumer reporting agency need not remove or temporarily lift a security freeze within the time specified in subsection (3) of this section if the consumer fails to meet the requirements of subsection (1) or (2) of this section, as applicable, or the consumer reporting agency's ability to remove the security freeze within such time is prevented by:

- (a) An act of God, including fire, earthquake, hurricane, storm or similar natural disaster or phenomenon;
- (b) Unauthorized or illegal acts by a third party, including terrorism, sabotage, riot, vandalism, labor strikes or disputes disrupting operations, or similar occurrence;
- (c) Operation interruption, including electrical failure, unanticipated delay in equipment or replacement part delivery, computer hardware or software failures inhibiting response time, or similar disruption;
- (d) Governmental action, including emergency order or regulation, judicial or law enforcement action or similar directive;
- (e) Regularly scheduled maintenance, during other than normal business hours, of, or updates to, the consumer reporting agency's systems;
- (f) Commercially reasonable maintenance of, or repair to, the consumer reporting agency's systems that is unexpected or unscheduled; or

(g) Receipt of a removal request outside of normal business hours.

History.

I.C., § 28-52-104, as added by 2008, ch. 177, § 2, p. 524.

28-52-105. Exceptions. — (1) Notwithstanding subsection (1) of section 28-52-103, Idaho Code, a consumer reporting agency may furnish a consumer's credit report to a third party if the purpose of the credit report is to:

- (a) Use the credit report for purposes permitted under 15 U.S.C. section 1681b(c);
- (b) Review the consumer's account with the third party, including for account maintenance or monitoring credit line increases or other upgrades or enhancements;
- (c) Collect on a financial obligation owed by the consumer to the third party requesting the credit report; or
- (d) Review the consumer's account with another person, or collect on a financial obligation owed by the consumer to another person and the credit report request is for purposes permitted under 15 U.S.C. section 1681b(c) or the third party requesting the credit report is a subsidiary, affiliate, agent, assignee or prospective assignee of the person holding the consumer's account or to whom the consumer owes a financial obligation.

(2) The consumer's request for a security freeze does not prohibit the consumer reporting agency from disclosing the consumer's credit report for other than credit related purposes consistent with the definition of credit report in section 28-52-102, Idaho Code. The following list identifies the types of credit report disclosures by consumer reporting agencies to third parties that are not prohibited by a security freeze:

- (a) The third party does not use the credit report for the purpose of serving as a factor in establishing a consumer's eligibility for credit;
- (b) The third party is acting under a court order, warrant or subpoena requiring release of the credit report;
- (c) The third party is a child support agency, or its agent or assignee acting under part D, title IV, of the social security act or a similar state law;
- (d) The third party is the federal department of health and human services or a similar state agency, or its agent or assignee, investigating medicare or medicaid fraud;
- (e) The purpose of the credit report is to investigate or collect delinquent taxes, assessments or unpaid court orders and the third party is the federal internal revenue service; a state taxing authority; the division of motor vehicles of the Idaho transportation department; a county, municipality or other taxing district; a federal, state or local law enforcement agency; or the agent or assignee listed in subsection (1) or (2) of this section;
- (f) The third party is using the information solely for criminal record information, tenant screening, employment screening, fraud prevention or detection, or personal loss history information;

- (g) The third party is a person or entity regulated under title 41, Idaho Code;
 - (h) The third party is administering a credit file monitoring service to which the consumer has subscribed; or
 - (i) The third party requests the credit report for the sole purpose of providing the consumer with a copy of the consumer's credit report or credit score upon the consumer's request.
- (3) Section 28-52-103, Idaho Code, does not apply to:
- (a) A consumer reporting agency, the sole purpose of which is to resell credit information by assembling and merging information contained in the database of another consumer reporting agency and that does not maintain a permanent database of credit information from which a consumer's credit report is produced;
 - (b) A check services or fraud prevention services company that issues reports on incidents of fraud or authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers or similar methods of payment; or
 - (c) A deposit account information service company that issues reports concerning account closures based on fraud, substantial overdrafts, automated teller machine abuse or similar information concerning a consumer to a requesting financial institution for the purpose of evaluating a consumer's request to create a deposit account.
- (4) Nothing in this chapter prohibits a person from obtaining, aggregating or using information lawfully obtained from public records in a manner that does not otherwise violate the provisions of this chapter.

History.

I.C., § 28-52-105, as added by 2008, ch. 177, § 2, p. 525.

STATUTORY NOTES**Federal References.**

Part D, title IV, of the social security act,

referred to in paragraph (2)(c), is codified as 42 U.S.C.S. § 651 et seq.

28-52-106. Fees for security freeze. — (1) Except as provided in subsection (2) of this section, a consumer reporting agency may charge an administrative fee, not to exceed six dollars (\$6.00), to a consumer for each placement of a security freeze, and six dollars (\$6.00) for each temporary lift of a security freeze. A consumer reporting agency may not charge an administrative fee for a removal of a security freeze.

(2) A consumer reporting agency may not charge a fee under section 28-52-103(1)(c), Idaho Code, to a consumer who has been the victim of identity theft and who has submitted to the consumer reporting agency a valid police report, an investigative report or complaint that the consumer has filed with a law enforcement agency.

(3) A consumer may be charged a reasonable fee, not to exceed ten dollars (\$10.00), if the consumer fails to retain the original personal identification number, password or other device provided by the consumer reporting

agency and if the consumer asks the consumer reporting agency to reissue the same or a new personal identification number, password or other device.

History.

I.C., § 28-52-106, as added by 2008, ch. 177, § 2, p. 527.

28-52-107. Changes to information in a credit report subject to a security freeze. — (1) If a credit report is subject to a security freeze, a consumer reporting agency shall notify the consumer who is the subject of the credit report within thirty (30) days if the consumer reporting agency changes the consumer's name, date of birth, social security number or address.

(2) Notwithstanding subsection (1) of this section, a consumer reporting agency may make technical modifications to information in a credit report that is subject to a security freeze without providing notification to the consumer. Technical modifications include the addition or subtraction of abbreviations to names and addresses and transpositions or corrections of incorrect numbering or spelling.

(3) When providing notice of a change of address under subsection (1) of this section, the consumer reporting agency shall provide notice to the consumer at both the new address and the former address.

History.

I.C., § 28-52-107, as added by 2008, ch. 177, § 2, p. 527.

28-52-108. Protection of personal information. — (1) Except as otherwise specifically provided by law, a person shall not intentionally communicate an individual's social security number to the general public.

(2) The state of Idaho, a department, agency, board, commission or other political subdivision may not employ or contract for the employment of an inmate in any facility operated by the department of correction or private correctional facility contracted with the department of correction or county jail in any capacity that would allow any inmate access to any other person's personal information.

History.

I.C., § 28-52-108, as added by 2008, ch. 177, § 2, p. 527.

28-52-109. Enforcement. — (1) Except as otherwise specified in this section, any credit reporting agency that willfully fails to comply with any requirement imposed under this chapter with respect to any consumer is liable to that consumer in an amount equal to the sum of:

- (a) Any actual damages sustained by the consumer as a result of the failure or damages of not less than one hundred dollars (\$100) and not more than one thousand dollars (\$1,000); or
- (b) Such amount of punitive damages as the court may allow; and
- (c) In the case of any successful action to enforce any liability under this

section, the costs of the action together with reasonable attorney's fees as determined by the court.

(2) Any person who obtains a consumer report, requests a security freeze, requests the temporary lifting of a freeze or requests the removal of a security freeze from a consumer reporting agency under false pretenses or in an attempt to violate federal or state law shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or one thousand dollars (\$1,000), whichever is greater.

(3) Any credit reporting agency who is negligent in failing to comply with any requirement imposed under this chapter with respect to any consumer is liable to that consumer in an amount equal to the sum of:

(a) Any actual damages sustained by the consumer as a result of the failure; and

(b) In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(4) Upon a finding by the court that an unsuccessful pleading, motion or other paper filed in connection with an action under this chapter was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(5) The attorney general may enforce this chapter's provisions and, notwithstanding any other provision of law, the attorney general has exclusive authority to bring an action against a credit reporting agency for violation of section 28-52-104(3)(b), Idaho Code, concerning the requirement that a credit reporting agency temporarily lift a freeze within fifteen (15) minutes. In an action by the attorney general, a credit reporting agency that violates this chapter's provisions is subject to a civil penalty not less than one hundred dollars (\$100) or greater than one thousand dollars (\$1,000) for a violation or series of violations concerning a specific consumer and no greater than one hundred thousand dollars (\$100,000) in the aggregate for related violations concerning more than one (1) consumer. In addition to the penalties provided in this section, the attorney general may seek injunctive relief to prevent future violations of this chapter in the district court in Ada county or in the district court for the district in which a consumer resides who is the subject of a credit report on which a violation occurs.

History.

I.C., § 28-52-109, as added by 2008, ch. 177, § 2, p. 528.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

